2-26-2013

Renshaw v. Mortgage Electronic Registration Systems Clerk's Record v. 3 Dckt. 40512

G. Disclosure issues

1. We find no evidence the Servicer has complied with federal Truth in Lending Act (TILA) Disclosure requirements[5] requiring disclosure of the true investor owner of this loan in writing.
2. We find no evidence of disclosure of ownership of the Note and Deed of Trust in this foreclosure.
3. We find no evidence of a Home Affordable Modification Program (HAMP) as required by loans that have Government involvement such as Fannie Mae, Freddie Mac, Ginnie Mae and large financial servicing institutions such as GMAC who have agreed to offer them. A loan modification of this sort would back into a 31% debt to income ratio for Mr. Renshaw that could conceivably lower his monthly payment to around $435 per month.
4. We find no evidence of the initial lender, interim or current loan servicer having conducted meaningful mediations with the borrower to modify this loan with Mr. Renshaw.

---

5 *EC. 404. NOTIFICATION OF SALE OR TRANSFER OF MORTGAGE LOANS.*
(a) In General- Section 131 of the Truth in Lending Act (15 U.S.C. 1641) is amended by adding at the end the following:
'(g) Notice of New Creditor-
'(1) IN GENERAL- In addition to other disclosures required by this title, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including-- [underline emphasis added]
'(A) the identity, address, telephone number of the new creditor;
'(B) the date of transfer;
'(C) how to reach an agent or party having authority to act on behalf of the new creditor;
'(D) the location of the place where transfer of ownership of the debt is recorded; and
'(E) any other relevant information regarding the new creditor.
'(2) DEFINITION- As used in this subsection, the term 'mortgage loan' means any consumer credit transaction that is secured by the principal dwelling of a consumer.'.
(b) Private Right of Action- Section 130(a) of the Truth in Lending Act (15 U.S.C. 1640(a)) is amended by inserting 'subsection (f) or (g) of section 131,' after 'section 125,'

5. We find the parties seeking to foreclose intrinsically and extrinsically depriving examination of documentation by non-disclosure of the true owners and the securitized transaction.
6. According to the Attorney General's Multistate Task Force, trustees have statutory responsibility to Mr. Renshaw on one hand and the lender/creditor on the other. Therefore the Trustee is mandated to be independent third party. There is what appears to be an undisclosed irreconcilable conflict of interest because all the parties appear to be related to the party seeking to foreclose.
    a. It appears that the "trustee" is a debt collector based on their disclaimer found in the documentation. Loan servicers are known to sell defaulted loans to debt collectors but the fact the debt collector is acting as the Trustee poses a conflict of interest.

H. HAMP Loan Modification, Mediation and Workout Negotiation Issues

1. We find no attempt to contact Mr. Renshaw, a quadriplegic, about his rights to explore alternatives to foreclosure or his rights to request mediation.
2. No HAMP computation or analysis provided.
3. No HAMP loan modification negotiation or notice is evidenced.
4. Freddie Mac and many loan servicers such as GMAC have agreed to perform government sponsored HAMP loan modifications. There are various hierarchical programs on a waterfall basis to avoid foreclosure. These programs include lowering payments, principal, interest, extending loan amortization terms in varying combinations to bring payments on the mortgage down to a total debt ratio of 31% of borrower's monthly income. These programs, in existence and readily accessible, would easily afford Mr. Renshaw with the ability to keep his home on a long term sustainable loan program. This borrower is a quadraplegic as the result of a car accident and built this home to accommodate his needs.

I. Issues related to Standing to Foreclose

1. The parties seeking to foreclose have failed to demonstrate holder in due course status.
2. The foreclosing parties only have a miniscule stake as loan servicer of Mr. Renshaw's loan. What has not been taken into account are the profits from initial sale of this loan by Homecomings that, from a forensic accounting standpoint, offset claims of losses. Our research reveals that the initial Note and Deed of Trust were paid in full after their issuance in 2007
3. We find no evidence to demonstrate the Note and Deed of Trust were transferred to a foreclosing party. We find no evidence demonstrating that they are authorized as loan servicer of the undisclosed true beneficial owner.
4. There is no evidence provided that establishes ownership or a security interest in Mr. Renshaw's Note or Deed of Trust.

J. Deed of Trust/ General Assignment Issues

1. The parties seeking to foreclose Mr. Renshaw's Note and Deed of Trust have not demonstrated that:
    a. They are the current holder of the Note and Deed of Trust,
    b. That they are entitled to holder in due course status.
    c. That they are authorized to act on behalf of the true owner.
2. What we do find is parties seeking to foreclose that have:
    a. Participated in manipulation of the transfer of rights in this Note and Deed of Trust resulting in false claims.
    b. Supplied inaccurate and false documents.
    c. Have conflicts of interest that have not been disclosed.
    d. Are representing a faulty chain of title.
3. The signors on the Notices of Trustee Sale have not provided any proof that they hold a position which is authorized to initiate foreclosure and transfers of ownership.
4. The notary on The Notice of Default and Election to Sell Under Deed of Trust (see complaint exhibit 9) appear to be faulty.
    a. The documentation upon which she identified Carlo Magno has not been stated.

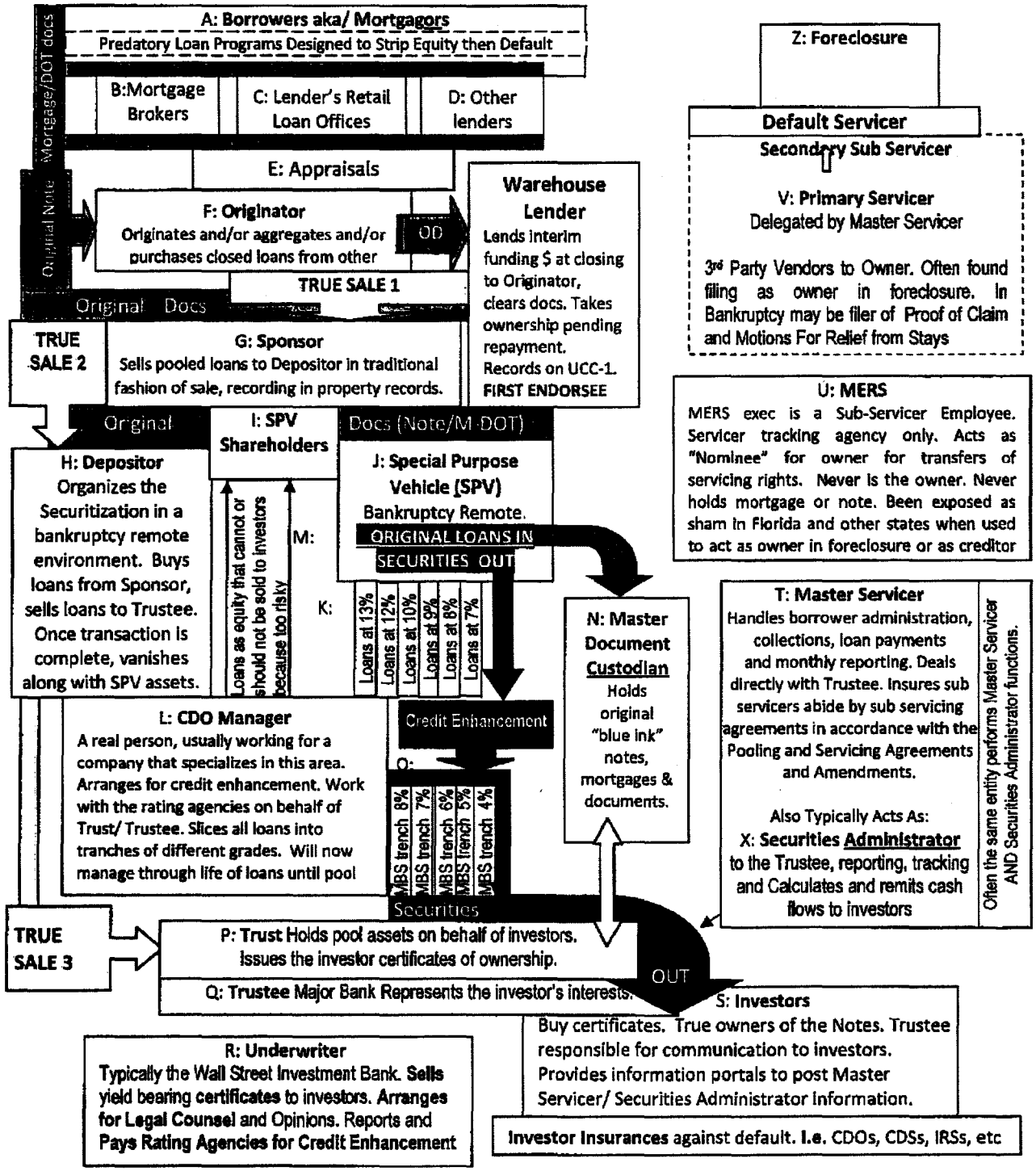
b. We provide a filed recorded Notice of Trustee Sale from Arizona dated 8/31/2010 which references Ms. Beltran with the same notary expiration date in California but under a different commission number. On Mr. Renshaw's Notice of Default and Election to Sell under Deed of Trust Ms. Beltran's commission number is 1777085. On the filing it is 3678531. This is indicative of robo-signing. According the Attorney Generals' Mulitstate Task Force, "affidavits and other documents asserting claims without knowledge of the facts, or confirming their accuracy, is known as "robo-signing". These include affidavits signed outside of the presence of a notary public, contrary to state law.[6]

Intentionally Left Blank

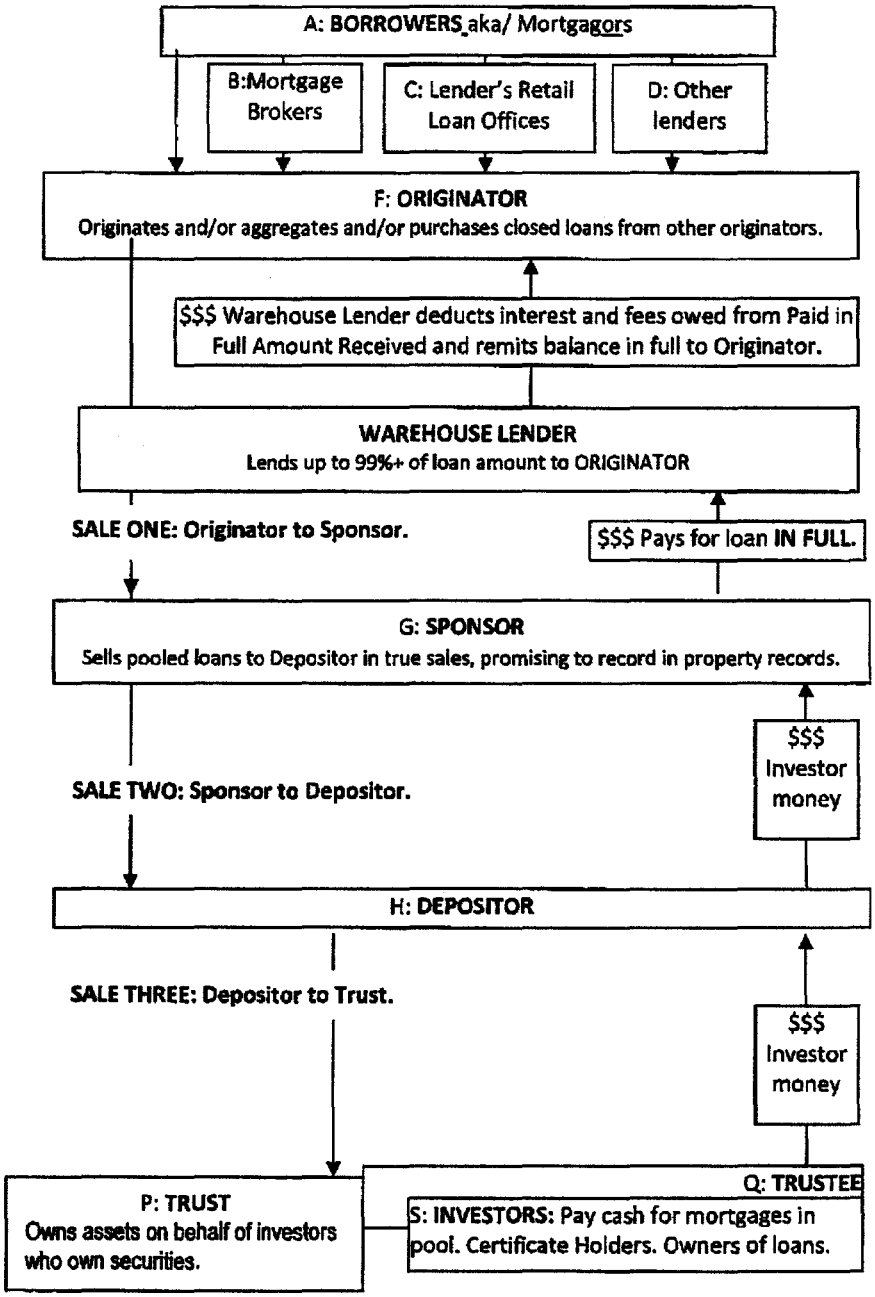
[6]

SUBSEQUENT SALES AND SECURITIZATION OF MR. RENSHAW'S LOAN

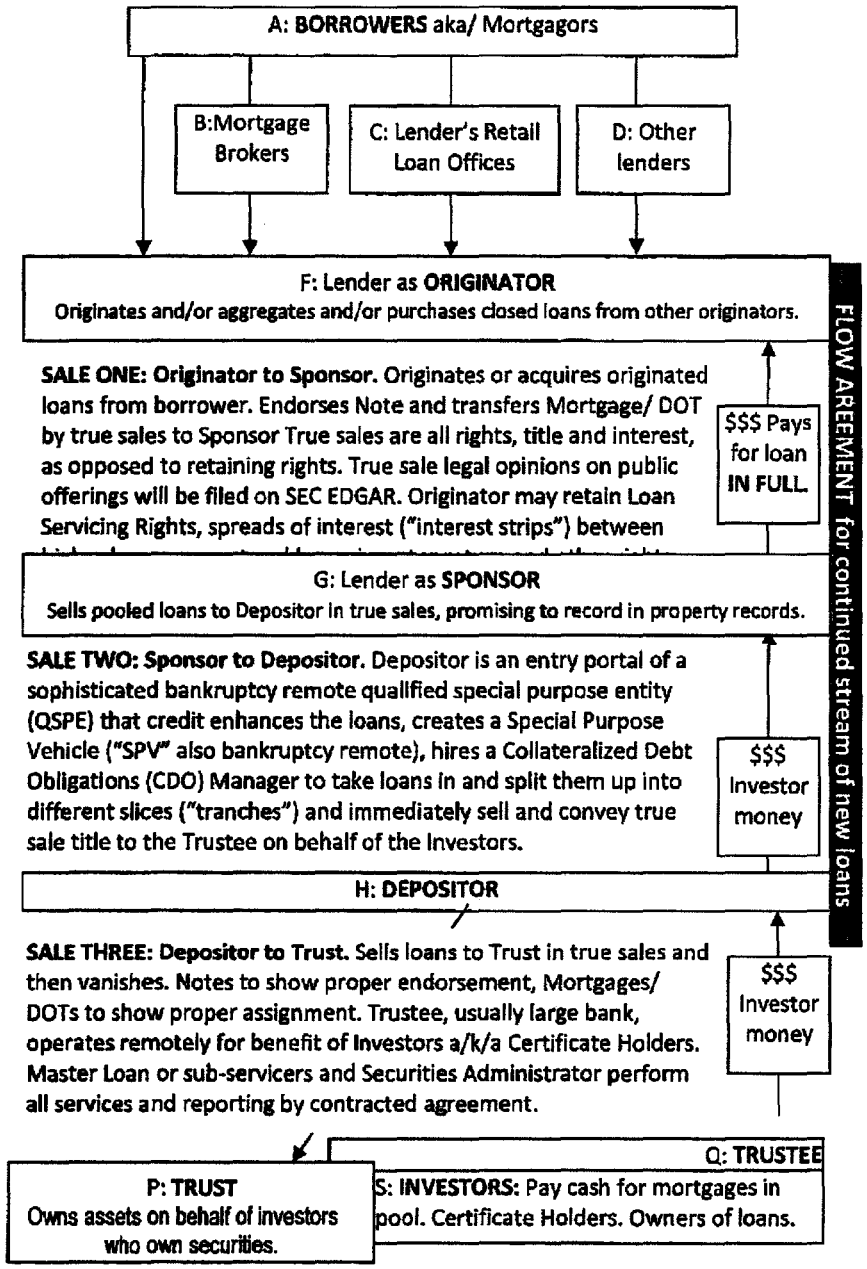
Our research reveals the transactional history of this loan is nothing like it is presented in the Notice of Trustee's Sale. It is a securitized loan, as illustrated in 4 charts provided in this report.



Undisclosed Subsequent Sale Summary of Mr. Renshaw's Loan



Undisclosed Subsequent Sale Detail of Mr. Renshaw's Loan



Undisclosed Subsequent Sale Essential Governing Documentation of Mr. Renshaw's Loan

F: Lender as **ORIGINATOR**
Originates and/or aggregates and/or purchases closed loans from other originators.

FLOW AGREEMENT – Originator promises to keep loan flowing for this deal and all deals under time, terms and payment specific terms.

MORTGAGE PURCHASE AGREEMENT – Stipulates conveyance and form of endorsement of Notes and assignment of Mortgages/ DOTs. Makes representations and warranties including provision of repurchase by Originator of defective loans.

G: Lender as **SPONSOR**
Sells pooled loans to Depositor in true sales, promising to record in property records.

MORTGAGE PURCHASE AGREEMENT – Stipulates conveyance and form of endorsement of Notes and assignment of Mortgages/ DOTs. Makes representations and warranties including provision of repurchase by Originator of defective loans.

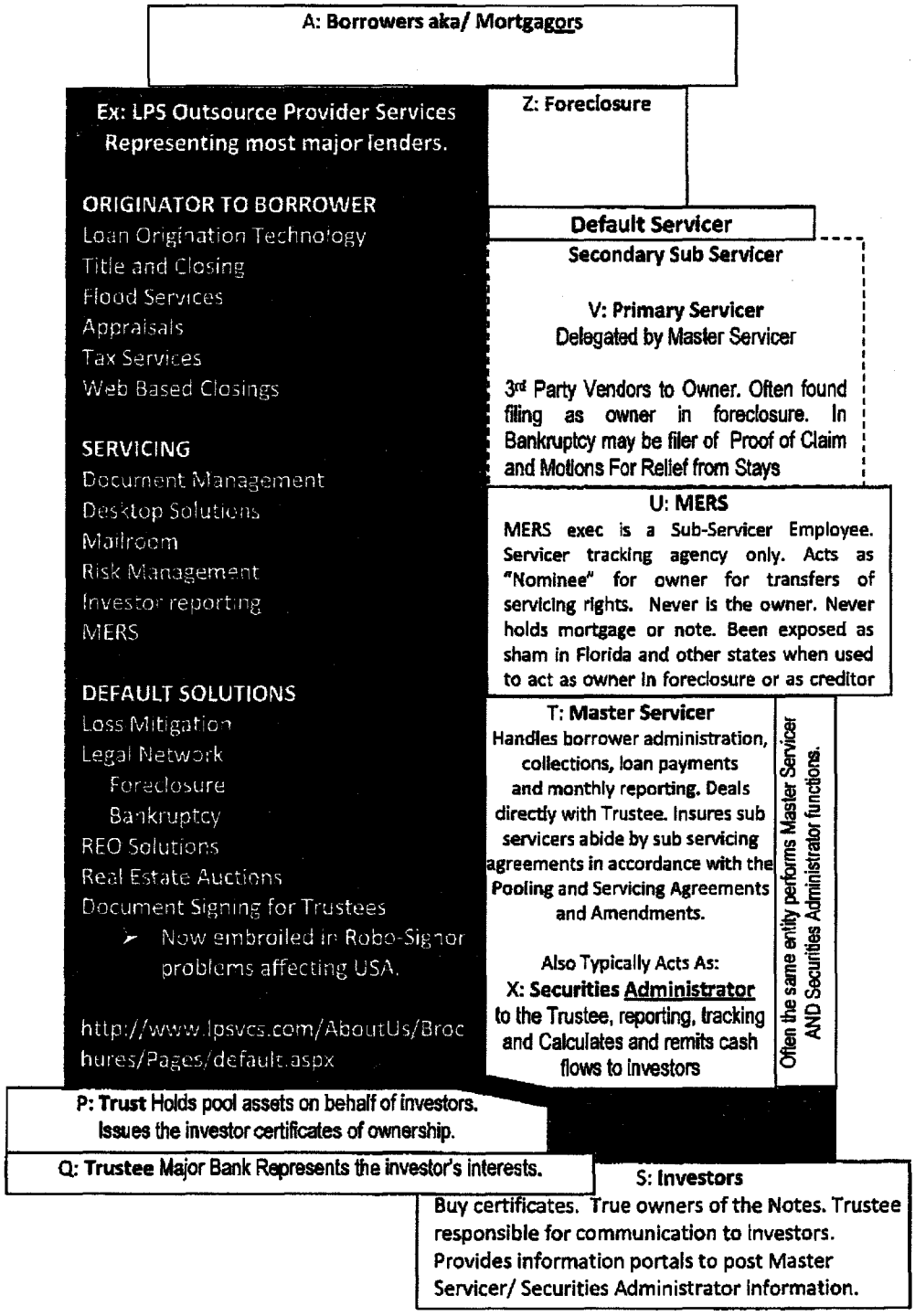
H: **DEPOSITOR**

POOLING AND SERVICING AGREEMENT – Stipulates conveyance and form of endorsement of Notes and assignment of Mortgages/ DOTs. Makes representations and warranties including provision of repurchase by Originator of defective loans. Specifies loan servicing policies and procedures and rights of investor owners.

MASTER DOCUMENT CUSTODIAN AGREEMENT – Identifies party who will take custody of, protect and ensure safety of all the properly endorsed Notes and assigned mortgages. Because sometimes these are made in blank, the originals may be bearer instruments payable to anyone who holds the "blue ink" originals. Extreme care and procedures are required of this responsible party.

Q: **TRUSTEE**

UNDISCLOSED OUTSOURCED LOAN SERVICING AFFECTING THIS LOAN



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DECLARATION OF RICHARD KAHN

A. I, Richard M Kahn, am an experienced mortgage analyst and my firm of which I am the principal and Senior Qualifying Expert, Forensic Professionals Group USA, Inc. ("FPG-USA"), specializes in providing third party forensic mortgage analysis to attorneys to use fighting foreclosure in court.

B. I have been actively involved in and earned my living in the fields of mortgage backed securitization, real estate, mortgage lending and mortgage analysis for more than 30 years. My resume may be obtained from http://www.fpg-usa.com/RK_Resume.cfm

C. I am the author of Winning Against Foreclosure, a Strategy Guide, written for attorneys, available on Amazon.com. More information is available at http://www.fpg-usa.com/WAF_Winning.cfm. This the first book in a series. My second book is expected to be released 2011.

D. FPG-USA specializes in securitized loan audits and provides mortgage analysis and reporting services in all U.S. States. I offer my services as expert witness on my evidentiary findings issuances for a nominal fee via teleconference and/or video conference.

E. I have performed dozens of forensic mortgage analysis, securitization and loan audits for attorneys fighting foreclosure in various State and Federal courts including civil and bankruptcy. 2010 included such states as Arizona, California, Florida, Georgia, Idaho, Illinois, Maryland, Minnesota, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Texas, Utah, Virginia and Washington State.

F. My evidentiary findings reports are intended as written testimony based upon research and discover. They seek to present facts which are undisputable due to the quality of the source and not objectionable because they pertain to material issues. They are intended to serve as evidence or proof and may include my personal clarification for the purpose of establishing the basis of facts contained therein.

G. Our fees are collected upon the placing of an order(s) without contingency of their results. Neither FPG-USA nor I have any financial interest in the outcome of this case. In all regards, I am a disinterested person within the meaning of 11 U.S.C. §101(14).

By my signature below, I declare under penalty of perjury that the foregoing declarations are true and correct.

Richard M. Kahn, Signed on December 31, 2010
Principal, Sr. Qualifying Expert

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Freddie Mac
How to Get Help with Your Mortgage

Yes. Our records show that Freddie Mac is the owner of your mortgage.

En Español

What to Do Next

1. **For help with your mortgage, contact your lender and let them know you would like to pursue assistance through the federal Making Home Affordable program.**

   (Your lender is the company to which you make your mortgage payments, and may also be referred to as a mortgage servicer.) Your lender can help you determine if you are eligible for the Making Home Affordable Program.

   a. **Through the Making Home Affordable program,** there are several options available to you:

      - A **Home Affordable Modification** to help you obtain more affordable mortage payments if you're behind in making your mortgage payments or believe you may be soon.
      - A **Home Affordable Refinance** to better position you for long-term homeownership success if you have been making timely mortgage payments but have been unable to refinance due to declining property values.
      - A **short sale** or **"deed-in-lieu of foreclosure"** to transition to more affordable housing if it is not realistic for you to keep your home.

   Freddie Mac is working with our mortgage servicers (your lenders) to offer these solutions to eligible borrowers with Freddie Mac-owned mortgages. *Because Freddie Mac does not work directly with consumers, you will need to work with your lender to determine your best foreclosure prevention option.*

   b. **If you are not eligible for the Making Home Affordable program,** don't give up! Ask your lender about other options to make your payments more affordable or to

avoid foreclosure. There are other options available for homeowners with Freddie Mac-owned mortgages that are available through your lender.

2. **If you are unable to reach your lender, call a U.S. Department of Housing & Urban Development (HUD)-certified housing counselor at 1-800-569-4287 or visit the web site to find a housing counselor in your area.**

   Housing counselors can help you contact and work with your lender to get help with your mortgage – free of charge

Support Information:

What to Expect

Be patient and diligent. Lenders are working hard to get to every call and sometimes it takes longer than you expect.

Be prepared. Before you call your lender, here's what you'll need for your conversation.

Get more information:

Learn more about the federal Making Home Affordable program and the options available to you.

Get answers to our most frequently asked questions about the Making Home Affordable program.

Visit our Working With Your Lender to Stop Foreclosure page to help prepare for your discussion with your lender.

Read about others who have successfully found options to avoid foreclosure.

Thank you for contacting Freddie Mac. One of our top priorities is making sure homeowners with Freddie Mac-owned mortgages are able to get proper help and understand all options available to them during this difficult time.

Select borrower type and enter borrower information to see Investor for MIN 1000626-0473793636-1.

◉ Investor for Individual Borrower

Your entries may be either upper or lower case.
*Fields markedare required.

*Last Name: Renshaw

*SSN: [redacted] - [redacted] - [redacted]

☐ By checking this box, the borrower or borrower's authorized representative is attesting to the fact that he or she is in fact the borrower or borrower's authorized representative for the loan in question. Additionally, borrowers wishing to learn the identity of their loan's investor must confirm their identity by entering their last name or corporation name as well as their SSN or TIN. If this information does not match the information contained in the MERS® System for the borrower of the loan, the investor information will not be displayed. Borrowers should verify the results with *their loan servicer.

Submit

○ Investor for Corporation/Non-Person Entity Borrower

Your entries may be either upper or lower case.
*Fields markedare required.

Corporation/Non-Person Entity Name:

**Taxpayer Identification Number:

☐ By checking this box, the borrower or borrower's authorized representative is attesting to the fact that he or she is in fact the borrower or borrower's authorized representative for the loan in question. Additionally, borrowers wishing to learn the identity of their loan's investor must confirm their identity by entering their last name or corporation name as well as their SSN or TIN. If this information does not match the information contained in the MERS® System for the borrower of the loan, the investor information will not be displayed. Borrowers should verify the results with *their loan servicer.

Submit

Servicer: GMAC Mortgage, LLC
Waterloo, IA

Phone: (800) 766-4622

Investor: Federal Home Loan Mortgage Corporation

Close Window

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1 record matched your search:

MIN: 1000626-0473793636-1 Note Date: 06/27/2007 MIN Status: Active

Servicer: GMAC Mortgage, LLC
Waterloo, IA
Phone: (800) 766-4622

Investor: This investor has chosen not to display their information. For assistance, please contact the servicer.

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Footnote 1 and 3 to
Forensic Lender Discovery
Stage One
Loan Securitization Audit Report

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October 13, 2010

JOINT STATEMENT OF THE MORTGAGE FORECLOSURE MULTISTATE GROUP

It has recently come to light that a number of mortgage loan servicers have submitted affidavits or signed other documents in support of either a judicial or non-judicial foreclosure that appear to have procedural defects. In particular, it appears affidavits and other documents have been signed by persons who did not have personal knowledge of the facts asserted in the documents. In addition, it appears that many affidavits were signed outside of the presence of a notary public, contrary to state law. This process of signing documents without confirming their accuracy has come to be known as "robo-signing." We believe such a process may constitute a deceptive act and/or an unfair practice or otherwise violate state laws.

In order to handle this issue in the most efficient and consistent manner possible, the states have formed a bi-partisan multistate group to address issues common to a large number of states. The group is comprised of both state Attorneys General and the state bank and mortgage regulators. Currently 49 state Attorneys General have joined this coordinated multistate effort. State bank and mortgage regulators are participating both individually and through their Multistate Mortgage Committee, which represents mortgage regulators from all 50 states. Through this process, the states will attempt to speak with one voice to the greatest extent possible. At the end of this statement is a list of the participating states.

Our multistate group has begun inquiring whether or not individual mortgage servicers have improperly submitted affidavits or other documents in support of foreclosures in our states. The facts uncovered in our review will dictate the scope of our inquiry. The Executive Committee is comprised of the following Attorneys General Offices: Arizona, California, Colorado, Connecticut, Florida, Illinois, Iowa, New York, North Carolina, Ohio, Texas, and Washington; and the following state banking regulators: Maryland Office of the Commissioner of Financial Regulation, New York State Banking Department, and the Pennsylvania Department of Banking.

Participating Attorneys General

Alaska
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Arkansas
California
Colorado
Connecticut
Delaware
Florida
Georgia
Hawaii Department of the Attorney General / Hawaii Office of Consumer Protection
Idaho
Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Missouri
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
New York
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Carolina
South Dakota
Tennessee
Texas
Utah
Vermont

Virginia
Washington
West Virginia
Wisconsin
Wyoming

Participating State Bank and Mortgage Regulators

Arizona Department of Financial Institutions
Arkansas Securities Department
Connecticut Department of Banking
D.C. Department of Insurance Securities and Banking
Florida Office of Financial Regulation
Idaho Department of Finance
Illinois Secretary of Financial and Professional Regulation
Indiana Department of Financial Institutions
Iowa Division of Banking
Kentucky Department of Financial Institutions
Louisiana Office of Financial Institutions
Maine Bureau of Consumer Credit Protection
Maine Bureau of Financial Institutions
Maryland Office of the Commissioner of Financial Regulation
Division of Banks, Commonwealth of Massachusetts
Michigan Office of Financial & Insurance Regulation
Minnesota Department of Commerce
Mississippi Department of Banking and Consumer Finance
Montana Division of Banking and Financial Institutions
Nebraska Department of Banking and Finance
Nevada Financial Institutions Division and Mortgage Lending Division
New Hampshire Banking Department
New Jersey Department of Banking & Insurance – Office of Consumer Finance
New York Department of Banking
North Carolina Commissioner of Banks
North Dakota Department of Financial Institutions
Ohio Division of Financial Institutions
Oregon Department of Consumer and Business Services – Division of Finance and Corporate Securities
Pennsylvania Department of Banking
Rhode Island Department of Business Regulation - Division of Banking
South Carolina Department of Consumer Affairs
Tennessee Department of Financial Institutions
Texas Department of Banking
Texas Finance Commission and Consumer Credit Commissioner
Vermont Department of Banking, Insurance, Securities and Health Care Administration
Washington State Department of Financial Institutions

West Virginia Division of Banking
Wisconsin Department of Banking
Wyoming Division of Banking

Footnote 2 to
Forensic Lender Discovery
Stage One
Loan Securitization Audit Report

Richard Kahn

From: okech dorothy [dokech2001@yahoo.com]
Sent: Tuesday, January 04, 2011 10:35 AM
To: Richard Kahn
Subject: Re: Contact

Richard,
It was a pleasure talking to you. As discussed, let me know when you have some business in Minnesota and we can figure out the details.
Thank you for your time.

Dorothy Okech

From: Richard Kahn <rkahn@fpg-usa.com>
To: dokech2001@yahoo.com
Sent: Tue, January 4, 2011 7:57:17 AM
Subject: MN Bar question

Hi Dorothy. I don't know if this is you but I see you were recently admitted to the MN bar. Congratulations. Are you the same Dorothy that worked in the mortgage industry while going to school?

Richard Kahn
Ph: 305-508-4231
F: 305-675-7676
rkahn@fpg-usa.com

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Minnesota Secretary of State Online Access

BUSINESS ORGANIZATIONS INQUIRY - VIEW ENTITY

Filing Number:	3159682-2	**Entity Type:**	Limited Liability Company
Original Date of Filing:	1/12/2009	**Entity Status:**	Active
Entity Date to Expire:		**Chapter:**	322B
Good Standing: (date of last annual filing)			

Name:	ULTRA CARE HOME HEALTH, LLC
Registered Office Address:	7714 Brooklyn Blvd #108 Brooklyn Park, MN, 55443
Home State:	MN
Agent Name:	No Agent Filed

Additional Entity Detail | Return to Search List | New Search

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002870 PLF 03055

MSBA Minnesota State Bar Association
600 Nicollet Mall #380
Minneapolis, MN 55402
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Return to Search Page.

Dorothy Okech

1867 Dellwood Av Admitted to MN bar: 10/29/2010
Roseville, MN 55113
Phone: / Fax:
dokech2001@yahoo.com

If the results do not include someone whom you are positive they should, it may be because that person is

- not a member of the MSBA, or
- has asked that their information not be listed in the MSBA's print directory.

Members may choose whether to have their home address or business address used in the directory; this database uses the business address when possible. It could also be that you have provided more information than is needed, but our database differs from what you entered in some respect. The fewer fields you can use to find the right person, the better.

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NPIdb NPI Look Up from the NPI Registry

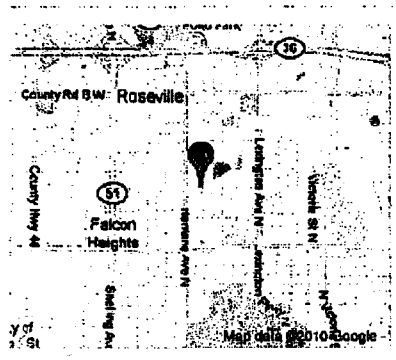
ULTRA CARE HOME HEALTH LLC, Agencies / Home Health

A public agency or private organization, or a subdivision of such an agency or organization, that is primarily engaged in providing skilled nursing services and other therapeutic services, such as physical therapy, speech-language pathology services, or occupational therapy, medical social services, and home health aide services. It has policies established by a professional group associated with the agency or organization (including at least one physician and one registered nurse) to govern the services and provides for supervision of such services by a physician or a registered nurse; maintains clinical records on all patients; is licensed in accordance with State or local law or is approved by the State or local licensing agency as meeting the licensing standards, where applicable; and meets other conditions found by the Secretary of Health and Human Services to be necessary for health and safety.

Information on ULTRA CARE HOME HEALTH LLC

Reviews

NPI Number	1629204854
State Identifier(s)	
Group Name	ULTRA CARE HOME HEALTH LLC
Credentials	- Lic #:343855 (Minnesota)
Mailing Address	Confidential
Business Address	1867 DELLWOOD AVE ROSEVILLE, MN 55113-6103
	Phone (651) 493-8620 Fax (651) 493-8620
Name	DOROTHY OKECH - (DIRECTOR/OWNER)
Primary Specialty	Agencies / Home Health
Additional Specialties	
Last Modified	06/02/2009



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info@ultrahomehealthcare.com

Welcome to Ultra Care Home Health LLC

Taking pride in the ensemble of Skilled Nurses and Personal Care Attendants, we take on the challenges of the home health care industry with confidence in our seamless focus for quality and client satisfaction.

Ultra Care Home Health LLC is a licensed, insured, and bonded home health care agency providing 24 hour nursing services to patients with skilled nursing needs. Our staff helps patients remain at home or return home sooner after recovering from illness, surgery, or other medical condition. Our caregivers respect the dignity of each person they serve and recognize how important family, friends, and familiar surroundings are to the patient's sense of comfort and well-being.

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Looking for a customized care plan? Visit our office or get in touch with us to set an appointment. Our friendly staff will be happy to discuss care options at a time that is convenient with you.

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The healthcare industry is an endlessly expanding trade that enables passionate Registered Nurses, Nursing Aides, Personal Care Attendants and Home Health Aides to practice their profession at a career pace that is both challenging and rewarding. We invite qualified applicants to join our care team. Sending an application is made easier online.

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Footnote 4 to
Forensic Lender Discovery
Stage One
Loan Securitization Audit Report

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Appellant,

v.

LISA MARIE CHONG, LENARD E. SCHWARTZER, BANKRUPTCY TRUSTEE, *et al.*,

Appellees.

Dist. Ct. Case No. 2:09-CV-00661-KJD-LRL

Bankr. Ct. Case No. BK-S-07-16645-LBR

ORDER

Presently before the Court is Appellant's Appeal under 28 U.S.C. § 158(a) from the Bankruptcy Court's Order Denying Motion to Lift Stay entered in the Adversary Proceeding No. BK-S-07-16645-LBR, docket no. 49, March 31, 2009. Having considered the briefs and the record on appeal, including the arguments of parties at the consolidated hearing on November 10, 2009, the Court affirms the Order of the Bankruptcy Court.

I. Procedural History and Facts

On April 14, 2009, Appellant Mortgage Electronic Registration Systems, Inc. ("MERS") filed Notice of Appeal (#1) appealing the Bankruptcy Court's order denying Appellant's motion for relief

from stay. This appeal is one of approximately eighteen (18) similar cases in which the Bankruptcy Court ruled that Appellant lacked standing to bring the motion.

In the underlying bankruptcy action, MERS filed its Motion for Relief from Stay ("the Motion") pursuant to Federal Rule of Bankruptcy Practice ("Rule") 4001 on January 14, 2008 seeking to have the automatic stay lifted so that MERS could conduct a non-judicial foreclosure sale on debtor's real property because the debtor lacked the ability to make payments and could not provide adequate security. Trustee Lenard E. Schwartzer ("Trustee") filed objections to the Motion claiming that MERS did not have standing as a real party in interest under the Rules to file the motion. (Appellant's Appendix ("Appx.") Doc. No. 12, p. 34). In response, Appellant filed the Declaration of Faatima Straggans, an employee of Homecomings Financial, LLC the authorized servicing agent for MERS, attempting to authenticate a copy of the original Deed of Trust ("Deed") and Note. (Appx. 36–38). The Deed described MERS as beneficiary and identified MERS as the nominee of the original lender, FMC Capital LLC. *Id.* However, the Declaration identified neither the current owner of the beneficial interest in the Note, nor any of the successors or assignees of the Deed of Trust. The Declaration also failed to assert that MERS, FMC Capital LLC or Homecomings Financial, LLC held the Note.

Due to the similar issues raised regarding motions for relief from stay in approximately twenty-seven (27) cases involving MERS, the Bankruptcy Court set a joint hearing for all twenty-seven cases. (Appx. 113–18). The Bankruptcy Court also ordered consolidated briefing for all cases to be filed in Case No. 07-16226-LBR, *In re Mitchell*, the "lead case". *Id.* In a majority of the cases, including the present case, Appellant attempted to withdraw the Motion but was procedurally unable to do so, because the Trustee would not consent. (Appx. 1383, 1902-1904, 1907-1909). MERS informed the Bankruptcy Court that it had attempted to withdraw the Motion, because it had been filed contrary to its own corporate procedures. (Appx. 432). Particularly in this case, MERS was unable to show that a MERS Certifying Officer was in physical possession of the Note at the time the Motion was filed. (Appx. 624).

A final hearing was held on August 19, 2008. (Appx. 650-729). On March 31, 2009, the Bankruptcy Court issued Memorandum Opinions and Orders denying MERS' motions for relief from stay in *Mitchell* and two other cases. (Appx. 740-54, 1581-95, 1959-72). In the remaining cases, including the present case, the Bankruptcy Court denied the motions for relief from stay by incorporating the reasoning from the *Mitchell* Memorandum Opinion. (Appx.46).

The Bankruptcy Court held that MERS lacked standing because it was not a real party in interest as required by the Rules. (Appx. 740-54). Specifically, the court found that "[w]hile MERS may have standing to prosecute the motion in the name of its Member as nominee, there is no evidence that the named nominee is entitled to enforce the note or that MERS is the agent of the note's holder." (Appx. 753). The court further held that MERS' asserted interest as beneficiary under the contract terms did not confer standing because MERS had no actual beneficial interest in the note and, therefore, was not a beneficiary. (Appx. 745-48).

MERS now appeals that order asserting that the Bankruptcy Court erred as a matter of law when it determined that MERS may not be a beneficiary under the deeds of trust at issue in the eighteen consolidated cases where the express language of the deeds of trust provide that MERS is the beneficiary. The Trustee continues to assert that MERS lacks standing because it is not a real party in interest.

II. Standard of Review

This Court has jurisdiction pursuant to 28 U.S.C. § 158(a) and reviews the Bankruptcy Court's findings under the same standard that the court of appeals would review a district court's findings in a civil matter. 28 U.S.C. § 158(c)(2). Therefore, the Court reviews the Bankruptcy Court's factual findings under a clearly erroneous standard, and conclusions of law *de novo*. *See In re Healthcentral.com*, 504 F.3d 775, 783 (9th Cir. 2007); *In re First Magnus Fin. Corp.*, 403 B.R. 659, 663 (D. Ariz. 2009).

III. Analysis

This appeal arises from eighteen cases in which MERS filed motions for relief from stay in the Bankruptcy Court. In each case, either a party or the Bankruptcy Court raised the issue of whether MERS had standing to bring the motion. In holding that MERS did not have standing as the real party in interest to bring the motion for relief from stay, the Bankruptcy Court determined that MERS was not a beneficiary in spite of language that designated MERS as such in the Deed of Trust at issue. MERS seeks to overturn the Bankruptcy Court's determination that it is not a beneficiary. However, the Court must affirm the Bankruptcy Court's order under the facts presented because MERS failed to present sufficient evidence demonstrating that it is a real party in interest.

A motion for relief from stay is a contested matter under the Bankruptcy Code. *See* Fed. R. Bankr. P. 4001(a); 9014(c). Bankruptcy Rule 7017 applies in contested matters. Rule 7017 incorporates Federal Rule of Civil Procedure 17(a)(1) which requires that "[a]n action must be prosecuted in the name of the real party in interest." *See also, In re Jacobson*, 402 B.R. 359, 365-66 (Bankr. W.D. Wash. 2009); *In re Hwang*, 396 B.R. 757, 766-67 (Bankr. C.D. Cal. 2008). Thus, while MERS argues the bankruptcy court erred when it determined that MERS was not a beneficiary under the deeds of trust, MERS only has standing in the context of the motion to lift stay under the Rules if it is the real party in interest. *See* Fed. R. Bankr. P. 7017.

Since MERS admits that it does not actually receive or forfeit money when borrowers fail to make their payments, MERS must at least provide evidence of its alleged agency relationship with the real party in interest in order to have standing to seek relief from stay. *See Jacobson*, 402 B.R. at 366, n.7 (quoting *Hwang*, 396 B.R. at 767 ("the right to enforce a note on behalf of a noteholder does not convert the noteholder's agent into a real party in interest")). An agent for the purpose of bringing suit is "viewed as a nominal rather than a real party in interest and will be required to litigate in the name of his principal rather than his own name." *Hwang*, 396 B.R. at 767. This is particularly important in the District of Nevada where the Local Rules of Bankruptcy Practice require parties to communicate in good faith regarding resolution of a motion for relief from stay before it is

filed. LR 4001(a)(3). The parties cannot come to a resolution if those with a beneficial interest in the note have not been identified and engaged in the communication.

In the context of a motion for relief from stay, the movant, MERS in this case, bears the burden of proving it is a real party in interest. *In re Wilhelm*, 407 B.R. 392, 400 (Bankr. D. Idaho 2009)(citing *In re Hayes*, 393 B.R. 259, 267 (Bankr. D.Mass. 2008)("To have standing to seek relief from the automatic stay, [movant] was required to establish that it is a party in interest and that its rights are not those of another entity")). Initially, a movant seeking relief from stay may rely upon its motion. *Id.* However, if a trustee or debtor objects based upon standing, the movant must come forward with evidence of standing. *Id.*; *Jacobson*, 402 B.R. at 367 (requiring movant at least demonstrate who presently holds the note at issue or the source of movant's authority).

Instead of presenting the evidence to the Bankruptcy Court, MERS attempted to withdraw the Motion from the Bankruptcy Court's consideration, citing the failure of a MERS Certifying Officer to demonstrate that a member was in physical possession of the promissory note at the time the motion was filed.[1] The only evidence provided by MERS was a declaration that MERS had been identified as a beneficiary in the deed of trust and that it had been named nominee for the original lender. Since MERS provided no evidence that it was the agent or nominee for the current owner of the beneficial interest in the note, it has failed to meet its burden of establishing that it is a real party in interest with standing. Accordingly, the order of the Bankruptcy Court must be affirmed.

This holding is limited to the specific facts and procedural posture of the instant case. Since the Bankruptcy Court denied the Motion without prejudice nothing prevents Appellant from refiling the Motion in Bankruptcy Court providing the evidence it admits should be readily available in its system. The Court makes no finding that MERS would not be able to establish itself as a real party in interest had it identified the holder of the note or provided sufficient evidence of the source of its authority.

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[1]In other cases movant did not seek to withdraw the Motion, but similarly produced no evidence that it held the note or acted as the agent of the noteholder.

IV. Conclusion

Accordingly, **IT IS HEREBY ORDERED** that the Order of the Bankruptcy Court entered March 31, 2009 is **AFFIRMED**.

DATED this 4th day of December 2009.

Kent J. Dawson
United States District Judge

Footnote 6 to
Forensic Lender Discovery
Stage One
Loan Securitization Audit Report

Classified (published 08/31/2010)

13247: 08/10, 08/17, 08/24, 08/31/2010; NOTICE OF TRUSTEE'S SALE Recorded on 8/28/10 Loan # 0359396109 T. S. # AZ-240345-C Title Order # 14-94278 The following legally described trust property will be sold, pursuant to the power of Sale under that certain Deed of Trust dated 9/19/2006 and recorded on 9/25/2006 as Instrument # 2006-016486, Book Page Modification of Deed of Trust recorded 7/5/07 Inst. # 2007-011434 in the office of the County Recorder of Gila County, Arizona, at public auction to the highest bidder at At the front entrance to the County Courthouse, 1400 East Ash, Globe, Arizona, on 9/27/2010 at 11:00 AM of said day: Lot 247, ALPINE HEIGHTS, according to Map No. 559, records of Gila County, Arizona. ACCORDING TO THE DEED OF TRUST OR UPON INFORMATION SUPPLIED BY THE BENEFICIARY, THE FOLLOWING INFORMATION IS PROVIDED PURSUANT TO A.R.S. SECTION 33-808 (C): STREET ADDRESS OR IDENTIFIABLE LOCATION: 1422 N EASY STREET WAY PAYSON, AZ 85541 TAX PARCEL NUMBER: 302-75-247 ORIGINAL PRINCIPAL BALANCE: $252,000.00 NAME AND ADDRESS OF ORIGINAL TRUSTOR: (as shown on the Deed of Trust) Ricky Paul H. Guerrero, a married man as his sole and separate property 1422 N. Easy Street Way Payson, AZ 85541 NAME AND ADDRESS OF BENEFICIARY: (as of recording of Notice of Sale) MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. 1100 VIRGINIA DRIVE FORT WASHINGTON, PA 19034 NAME, ADDRESS & TELEPHONE NUMBER OF TRUSTEE: (as of recording of Notice of Sale) Executive Trustee Services, LLC 2255 North Ontario Street, Suite 400 Burbank, California 91504-3120 Sale Line: 714-730-2727 DATED: 6/23/2010 EXECUTIVE TRUSTEE SERVICES, LLC Marvell L. Carmouche, Limited Signing Officer "Executive Trustee Services, LLC is a licensed escrow agent and therefore qualified to act as a Trustee pursuant ARS Section 33-803(A)(1). Trustee's Regulator: Arizona State Banking Department." State of California County of Los Angeles On 6/23/2010 before me, Sally Beltran Notary Public, personally appeared Marvell L. Carmouche, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument. I certify under penalty of perjury under the laws of the State of California that the foregoing paragraph is true and correct. WITNESS my hand and official seal. Sally Beltran My Comm. Expires 10/30/2011 ASAP# 3678531 08/10/2010, 08/17/2010, 08/24/2010, 08/31/2010

Exhibit 36

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF ADA

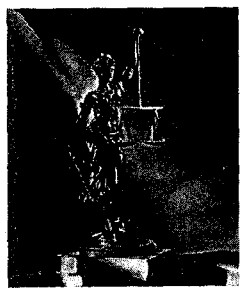
GREGORY RENSHAW, an Individual,

Plaintiff,

vs. CASE NO. CV OC 1023898

HOMECOMINGS FINANCIAL, LLC, a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware Limited Liability Company; DOES I-V, and ABC CORPORATIONS I-V,

Defendants.



DEPOSITION OF RICHARD M. KAHN
Taken on Behalf of the Defendant
Tuesday, June 12, 2012

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APPEARANCES:

On behalf of the Plaintiff:
JON M. STEELE, Esquire VIA TELEPHONE
RUNFT & STEELE LAW OFFICES
1020 West Main Street
Suite 400
Boise, Idaho 83702
(208) 333-8506

On behalf of the Defendant,
MERS:
MATTHEW J. MCGEE, Esquire VIA TELEPHONE
MOFFATT, THOMAS, BARRETT,
ROCK & FIELDS, CHARTERED
101 South Capitol Boulevard
10th Floor
Boise, Idaho 83701
(208) 345-2000

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DEPOSITION OF RICHARD M. KAHN
Taken on Behalf of the Defendant
Tuesday, June 12, 2012

Time: 10:50 a.m. - 5:15 p.m.
Location: 124 East Palm Drive, Room 120
Florida City, Florida 33034
Reported By: CATHERINE FITZPATRICK, FPR, CRI,
Court Reporter
Notary Public, State of Florida

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DEPOSITION OF RICHARD M. KAHN
Tuesday, June 12, 2012
10:50 a.m.

(Defendant's Exhibit 1, Amended Notice of Deposition Duces Tecum to Richard Merrill Kahn (telephonic), was marked for Identification.)
(Defendant's Exhibit 2, Interest-Only Period Adjustable Rate Note, was marked for Identification.)
(Defendant's Exhibit 3, Deed of Trust, was marked for Identification.)
(Defendant's Exhibit 4, Transfer Audit, Min Summary, Milestones, was marked for Identification.)
(Defendant's Exhibit 5, MersCorp., Inc., Rules of Membership, was marked for Identification.)
(Defendant's Exhibit 6, Appointment of Successor Trustee, was marked for Identification.)
(Defendant's Exhibit 7, Affidavits, was marked for Identification.)
(Defendant's Exhibit 8, Document Review and Assessment by FPG-USA, was marked for Identification.)
(Defendant's Exhibit 9, Stage One Loan Securitization Audit Report by FPG-USA, was marked for Identification.)
(Defendant's Exhibit 10, Affidavit and Testimony of Richard M. Kahn, was marked for Identification.)
(Defendant's Exhibit 11, Notice of Default and Election to Sell under Deed of Trust, was marked for Identification.)

RICHARD M. KAHN, having been first duly sworn or affirmed, was examined and testified as follows:

THE WITNESS: I do.
DIRECT EXAMINATION
BY MR. McGEE:
Q. All right. So we're on the record at the Deposition of Richard Merrill Kahn, set in an apparent error, on my part, for 11:00 a.m. Eastern time. We had spoken about 10:00 a.m. Eastern time, and I certainly do apologize for that error.
It is currently, I suppose, almost 11:00 a.m. Eastern time.
Good morning, Mr. Kahn. How are you today?
A. Very well, sir. Thank you.

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Q. Good. I'll start by asking, have you had your Deposition taken before?
A. Yes.
Q. Can you give me an approximate number of Depositions you've participated in in the last three years?
A. One.
Q. And what was the nature of the Deposition?
A. It was in the case of Malo versus E-Trade, in a Florida current foreclosure case. The opposing Counsel was the Consuegra Law Firm out of Tampa. The Depo was scheduled for three hours, but went five hours, and I was just recently advised by Kenneth Trent, the Attorney, that the Depo was not going to be used.
So I don't have the sign-off on it.
Q. Okay. And - so you've been deposed once, and you indicated that was in a foreclosure case. Was that a judicial foreclosure case --
A. Yes.
Q. -- or a Trustee's, nonjudicial foreclosure case?
A. Florida is a judicial State. That was a judicial foreclosure case.
Q. Okay.

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A. Excuse me. That is a - it's a case that's ongoing. There was a Trial date set for tomorrow, but I think they've moved it.
Q. And do you have any idea as to why your Deposition was not used?
A. An answer to that by me in this circumstance would be hearsay. But they did advise me why.
Q. Okay. And what did they advise you?
A. That it wouldn't be in the interests of Consuegra to use my Deposition because - for some reason.
Q. For what reason?
A. That, I don't know.
Q. Okay.
A. I'd like to know, but I don't know.
Q. Have you ever testified at a foreclosure-related Trial?
A. In Hearings and in Trial, yes.
Q. About how many times - we'll say within the last three years?
A. Several times.
Q. Ten?
A. Let's - hold on one moment, please, and I'm going to access my logs, and I'll be able to

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give you a better - I'd say - let me think. Well, it was in - I'd say about - I'm not sure, exactly, but I would estimate somewhere between six and eight. Maybe ten times.
Q. Okay.
A. Orally. But in written form, it's been dozens.
Q. Okay. And have you been - in those - in the cases where you've provided oral testimony, were you designated as an Expert?
A. Well, I came in from the Borrower's side as an Expert. Opposing Counsel, like yourself, wanted to undermine my expertise. But my expertise was sustained, and I have not ever had my expertise undermined.
And once it was sustained under Cross-Examination, then I was allowed to be examined, cross-examined and questioned by the Judge.
Q. Okay. And can you kind of define for me the scope of your expertise in those matters?
A. I provided to you an Affidavit of my expertise. Do you have that?
Q. I think I probably do, but I would ask you to just kind of go over it with me. Go over the scope of your expertise in those, I think, between

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six and ten matters that you've testified orally. What was the nature of your testimony in those matters - just generally speaking?
A. Okay. Hold on one moment, and let me access what I - may I access what I sent you - my Affidavit of Experience?
Q. I believe it's probably Exhibit 10 of the Exhibits I sent. I guess we might as well - I'll ask the Court Reporter to go ahead and hand you Exhibit 10, which has been already marked, and provide that to you.
A. Let me see if I have that in here. I have it in writing, and I have it before me on my computer screen.
As it says here, in Item 3, I'm a Securitization Expert with 35 years in the business.
Q. Okay. So the nature of your expertise is in securitization of residential mortgage loans; is that accurate?
A. It's in the industry. Residential and commercial - it's in the industry. It's from loan origination through warehousing, aggregation, sponsoring, bankruptcy remote enterprises - if you read my book, I brought a copy of the book here. I can let it - give it to the Court Reporter, and she

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can get it to you.
Do you have a copy?
Q. I don't.
A. That will - would you like a copy?
Q. Sure.
A. Okay. So you can put it in to Evidence, if you'd like.
Q. Well, I think we'll skip that for today because I don't have it in front of me.
MR. STEELE: Why don't you - if I could - Mr. McGee, if I could interrupt you. I'm sorry. Could I ask the Court Reporter to mark that as an additional Exhibit?
THE COURT REPORTER: Would you like it as a Plaintiff's Exhibit, or Defendant's Exhibit?
MR. McGEE: Well, I think we'll hold off on marking it as an Exhibit, Jon. I mean, you can - I would like to be able to review it, if we're going to mark it as an Exhibit and go over it today.
I mean, to the extent that you're going to question him at the end of my examination, perhaps you can wait until that time.
MR. STEELE: Okay. That's fine.
MR. McGEE: And I will get a copy of it so that I have some chance to review it and at least

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look at it.
MR. STEELE: I didn't mean to interrupt you.
Go ahead.
BY MR. McGEE:
Q. All right.
A. So the span of my 35 years of experience involves from borrower loan origination through the securitizing of residential and mortgage backed securities in the manner outlined in your Exhibit 10, in detail.
Q. Okay. And I guess this is a good opportunity. And I know this is expressed in some of your materials here, but I'd like to go over, very briefly, your - it appears to be extensive experience in the industry, and maybe starting with your education.
Can we start with your education, and you can describe your education, and then go over your industry experience real briefly for me?
A. Sure. I went to Miami-Dade Community College, and then I went to New York. And I went to one year of college there and was head-hunted by Merrill Lynch, who put me in to the Merrill Lynch University for a year, at which point I became a

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Commodities and Stock and Bond Broker.
I stayed at Merrill Lynch, right next to their One Liberty Plaza office, and continued back and forth with the University, both as a student, and a teacher and speaker, for the duration of my tenure there. And I became a Specialist in Real Estate Tax Sheltered Products - MBS are Real Estate Tax Sheltered Products; the REMICs are a result of the 1986 tax reformat.
Prior to that, there were different types of tax advantaged investments. And under the auspices of Don Regan, who I think was initially attracted to me because my middle name is Merrill, and I used to get to the office at a time so early that I had to sign in and a time so late that I - leaving at a time so late that I had to sign out, and then developing that relationship, I became - he appointed me the National Product Manager of Real Estate Tax Sheltered Investment Products. And I continued my career through there.
In this business, it's a constant learning experience, and here I am.
Q. Okay. So you were a National Product Manager appointed by Donald Regan; is that correct?
A. Yes. That's correct.

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Q. And when did that happen?
A. It's detailed in my Resume.
Q. Okay. Do you have that - do you know when it happened?
A. It was in the '70s, but I have to access my resume here. Here I am - in the back of my report is a Declaration and a Resume. I think it's Exhibit 9.
In the back of Exhibit 9 - I'll tell you what page.
Q. Okay. Well, so --
A. Could you hold on one minute?
Q. -- being a National Product Manager for these REMIC products, what other industry experience do you have?
A. Hold on one moment, please. I'm looking in my Exhibit 9, and I'm not finding my Declaration of Experience and my Resume, which means I should get that to you.
MR. STEELE: I believe it's at Page 10 of Exhibit 10, Richard.
THE WITNESS: Page 10 of Exhibit 10. Oh. There it is.
Okay. Thank you.
So if you look at my Resume, which I

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provide as part of my written sworn oath testimony under penalties of perjury in cases that I work on, you'll see that from 1973 through 1978, I was four years on Wall Street, National Real Estate Tax Shelter Product Manager.
BY MR. McGEE:
Q. Okay.
A. And my boss, as it mentions in here, who I was quite honored to work for, he was imposing character, was Don Regan, who became the Treasury Secretary under Ronal Reagan - Regan and Reagan - and then went on to be White House Chief of Staff.
And then, from 1978 through 1995, I had founded my own firm, which is in the - was the first mortgage analysis firm. My current firm, I consider myself a Mortgage Analyst. And that firm was from 1978 through 1995.
And then, from 1995 to 2008, I was thirteen years as a principal partner, broker of record, real estate, mortgage brokerage, residential and commercial lending.
And 2008 through the present, I've been the - I guess the supervising principal of FPG, Forensic Professionals Group.
Q. Okay. Let's go back to what you did from

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1978 to 1995. It looks like you were a founding partner of an off Wall Street firm, Affiliated Real Estate Analysts, specializing in securitized mortgage backed securities, real estate transactions, mortgage financing, lender compliance analysis, and forensic discovery.

Could you - you know, all of those words are good, but can you describe, you know, what you did on a day-to-day basis in your capacity there? Is it similar to what you're doing now, or --

A. I've written it down for anybody that is concerned, in my Affidavit of Experience, which is the front of this document. And it's on Page 3. And I'll read it to you:

"During the tenure of my experience, I have been intimately involved in borrower loan origination, underwriting, assignment, assumption of securitized residential and commercial mortgage loans, warehousing, aggregation, sponsoring, the bankruptcy remote enterprise of depositor, structured investment vehicles, special purpose vehicles, collateralized debt obligation management, loans in" - that's loans in, securities out, in my book - "document custodian, credit enhancement, creation of trusts, pooling agreements, issuance of

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asset backed securities, and specifically mortgage backed securities by the SPVs, Special Purpose Vehicles, in which an entity is named as Trustee for the holders of certificates of mortgage backed securities, REMIC vehicles" - I could add REIT TMPs, which are after 1986 - "pooling and servicing of securitized loans, Trustee sales, Trustees, sale of certificates to investors, institutional investor guidelines, underwriting securities, the securities industry, securities regulation, securities administration, investor issuance, derivative securities, derivative aftermarket trading, master loan servicing, sub-servicing, default servicing, foreclosure both in judicial and nonjudicial process with Trustees involved, and without Court intervention, and judicial process and civil complaint procedure with Court intervention."

And I have developed my own process and methodology --

Q. Okay. Let me just interrupt you real quickly. I don't need you to read through this whole thing. What I'm specifically getting at, Mr. Kahn, is, for example, you say you have experience and have been intimately involved with the following: Borrower loan origination.

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Now, what I'm trying to figure out is, in your capacity from 1978 to 1995, what specifically did you do with respect to borrower loan origination?

Did you - do you look at the borrower loan origination; do you look at how lenders were originating loans; did you originate loans? I just need to know in what capacity do you have familiarity with these topics at the firm you were at?

A. The firm that I founded, we operated both as a Principal and as an Agent.

Q. For whom?

A. I owned the firm.

Q. I understand. But --

A. You mean for --

Q. -- you were providing some kind of service in your capacity from 1978 to 1995 at this firm that you founded; is that correct?

A. Say that again, please?

Q. You were - you provided a service of some kind in that firm; is that correct?

A. Yes. That's correct. In mortgage backed securities - structuring of mortgage backed securities.

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Q. Okay. So the service you were providing was structuring mortgage backed securities?

A. And real estate transactions.

Q. Okay.

A. About 100 - hold on. In the billions of dollars. And providing mortgage financing and, also, all companies - well, my company had also quality control, and we provided services, for example, to Bache, and to Merrill, and to private syndicators that we weren't participating with as parties, in addition to the ones that we were participating in.

And, in those, I provided lender compliance analysis, and forensics discovery, to make sure that the underlying transactions were as presented.

Q. Okay. So the services you just described - lender compliance, et cetera - those are similar services that you're providing now, only you're providing to the residential borrower; is that correct?

A. Well, you could say that I was on the dark side for most of my career. And, yes, I do provide those services since 2008, or maybe the end of 2007, to borrowers.

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And I decided to do that as a result of the implosion of the marketplace, and the sub-prime financial crisis. It used to be that we were a self-regulated industry. And my boss, Don Regan, was one of the foremost promoters of that.

And what happened, as you will read in my book Exhibit, is that with the revocation of the Banking Act of 1933, in the - I think it was the Republican Congress of President Bill Clinton's last month in office in November, 1999, the Glass-Steagall Act, with the repeal of that Act, commercial banks and investment banks were, once again, able to join together and, from that 2000 period which people were really afraid of, as you may recall, the - what was it called - when the changing of 2000 from 1999 was supposed to create world calamity, if you recall?

MR. STEELE: Y2K.

THE WITNESS: Y2K. Thank you. And, in reality, what was happening is, that was kind of a fait. And, behind the scenes, the calamity that actually opened the thoroughbred racing gate of what was the issuance now of toxic mortgaged back securities, the investment houses did not have the ability to discern the mortgage lending banks'

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toxicity, or they were collaborating and pushing out loans designed to default.

A perfect example is the loan before you, the Renshaw loan. And they would sell those toxic loans to investors and make extraordinary profits in the process.

And, as a result, companies like my beloved Merrill Lynch, where I got my start and was promoted to go out off on my own and begin a long career of success in the industry, and go ahead and take the borrower's side --

BY MR. McGEE:

Q. Okay.

A. And, by the way, it's not that I'm against the lenders. I was always - and I am for honest, trustworthy lending. What I'm against is the type of toxic lending that has resulted in almost a Cold War in America with millions of homeowners facing foreclosure on loans that were designed to default.

Q. Okay. You mentioned - just getting back to your education, you mentioned that you were - you attended - I think you called it Merrill Lynch University?

A. That's what we called it. It was at One Liberty Plaza, and all Account Executives, and

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parties who were going to work for Merrill Lynch - Merrill Lynch had their own training facility.

Q. Okay. So did you - I mean, are they an accredited University?

A. I certainly don't think so.

Q. Okay. Do you have a Bachelor's degree, or an Associates degree --

A. I have no --

Q. -- or any type of college degree?

A. I have no formal college degree.

Q. Okay. So this Merrill Lynch University was kind of a training ground for brokers and commodities traders?

A. Merrill Lynch's University provided training to parties that were hired by Merrill Lynch in varying degrees to the area that they were going to work in. And, as I recall, it was - if you were going to be a stockbroker, for example, the course might have been four months.

I was specializing in different areas, and so my initial training was one year.

Q. Okay.

A. By 25, I had earned my first $1,000,000, and was very successful in the business. And I regret not going to formal college, but the

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business, as it was as such, carried me through in the day-to-day operations, and has sustained me through until today.

Q. Right. It sounds like you do okay for yourself without a college degree.

A. Well, you know, I put aside college degrees for all three of my children. And my oldest is now through her Master's, and continuing her education.

Q. Okay. So --

A. If you'd like to get in to the issues of this particular case, I'm ready.

Q. Yeah. That's where we're going. I just wanted to get some background on your experience.

A. I'd like to say that I've developed some considerable methods of analyzing, and processes, and methodologies, that I teach at my Academy, and that I utilize in the process of my services.

Q. Okay.

A. And I noted in your objection to my being called as an Expert that you didn't feel that that type of specialized knowledge would be important. But I am certain that I will unveil to you things here, in evidence, that you may not have realized - that are very material.

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Q. Okay. Well, with respect to the methodologies, I don't know - can you - is there a short course for me?

Can you describe these methodologies that you used to determine whether these loans are on the up-and-up, or is it - would it be easier to actually go through the documentation here, and you can describe it in this particular case?

A. Well, the course - the beginner and intermediate and advanced courses at my Academy that I teach is 210 hours of actual course curriculum.

Q. Okay. So can you give me the broad stroke version - i.e., you know, this is what we do for the first 30 hours?

A. Well, I can - the broad stroke version could be said in this manner, I suppose: Let me think for a moment, please. First, we intake all of the documents. Then we --

Q. And just - sorry to interrupt, but what documents are you talking about?

A. In securitization, it goes from the closing, forward.

Q. Okay.

A. So you would have a Note, a Deed of Trust, a Mortgage Statement, some letters maybe. And in

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nonjudicial, you'll have Trustee actions.

And we put that in to a timeline - not just in a manner of adding or citing an Exhibit, but going over the documents, and pulling out what we feel is - what I feel are material to the documents. And then, once that's done, we begin research. And we try to obtain evidence.

So we'll look towards the original lender, we'll look towards the parties involved, we'll look towards claims, status, check with Secretaries of State and, you know, do all of the research to find evidence.

And then, if there are parties involved in the actions, we research to find evidence on those parties, whether they're signers, or companies, or Trustees or actions.

And then we put that in to a graphical form where a Trust is not ID'd, for example, and itemize the chain in a graphical manner. Then, if there are any Trusts involved, whether we find it - and you could go to my website. I have a lot of services. We can find loans and Trusts, and sometimes that would be a smoking gun. And sometimes we have to make the circumstantial case, piling on rocks of evidence to indicate a

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securitized loan.

And then we investigate the aspects of the securitization - for example, the parties, the closing date, the Federal tax consequences - let's say whether they're a REMIC, or they're a REIT TMP, and the transactions that have taken place in the chain of the sale of the endorsement of the Note, and put those two together in a form that's called Making the Case.

So I take a look at the borrower and then, if there's a broker or Lender involved, I look at that. And I look at the originator. And then, if there was a warehouse lender involved, I look at the warehouse lender.

If that sale of the mortgage was then to a bankruptcy remote vehicle - for example, a depositor; they call it a depositor - or a sponsor, I look at that. I look at the Depositor's creation of the Trust in the bankruptcy remote environment, because they're buying the loans and then they are credit enhancing the loans, and they're splitting them in to tranches based upon credit, and through the special purpose vehicle.

And so you're taking the written - the loans are going in, but securities are coming out.

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And I look at the master document custodian, who is the party who they give the original blue ink notes and mortgages to, I look at the credit enhancement - whether it's Standard and Poor's, or Fitch's, or Moody's, or whatever.

And then I look at the CDO Manager's activities because, in practical sense, that would be how they're pricing the purchase of the loans, and the subsequent sale of the loans, and whether there are any interest strips, or participations that they're carving out to keep, or to sell.

And then I look at the sale, once that's all done, from the bankruptcy remote depositor's entity in to the Trust that's going to hold that pool of mortgage assets, and issues the investor certificates, and then I look at the Trustee, who is typically a major bank, specifically as the Trustee of the REMIC, or the REIT TMP, the mortgage backed security, and then I look at the underwriter.

And that's typically a Wall Street firm who is selling certificates that are going to be yielding interest, or principal, to whatever they've stipulated.

And then I look at attestations and certain things that are on the SEC for public

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transactions that have been provided by legal Counsel, or opinions, or reports, or reports by the rating agencies who follow the loans that they rate, and continually report on them.

And then I look at the investors, each transaction, when they terminate, in case of private label, they'll say who the investors - I had X amount of investors, less than 346 to whatever. And then I look at the insurances, if there are any investor insurances, for example, CDOs or CDSs - Credit Default Obligations, or Credit Default Swap insurance transactions --

Q. Okay.

A. -- and then I go in to the master servicer, and I look at the master servicer. I look at the securities administrator; I look at MERS. And you come in to the MERS area.

And then I look at the foreclosure transaction that may be processed either through the primary servicer, or the master servicer, or the secondary servicer, or the default servicer, and I come up with a picture.

I've just taken you basically through the course curriculum of the Academy.

Q. Okay.

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A. At that time, I try to then write a report and make sure that the evidence provided is not hearsay.

Q. Okay. All right. So is that, generally speaking, your process in examining these residential loans? I understand that there's probably more detail involved but, in a nutshell, that's your process?

A. Basically, that's the process. My new book coming out highlights the differences between private label mortgage backed securitization and Government sponsored enterprise. Your particular case is Government sponsored enterprise.

And in that process that I described to you, when we have Government sponsored enterprises, we look in the same manner as private label in to the entities.

In Government sponsored enterprises, we have the thousands of pages of written guidelines. So Fannie Mae has guidelines, Freddie Mac has guidelines, Ginnie Mae, Farmer Mac, they have guidelines.

And so, in a case like yours, the evidence that I'm going to bring forward if we ever - if and when we get to that - is going to include

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undisputable evidence that is from - taken from the sources of the guidelines.

Q. And so the undisputable evidence of what, exactly?

A. Well, you're deposing me. And it would be undisputable evidence of guidelines - the manner and method upon which business is conducted by the GSEs and the sellers and the servicers.

Q. Okay. So those are the rules of these GSEs. What I'm asking is, you're looking for, or are going to provide undisputable evidence of what, exactly - other than just that the rules exist?

A. Well, each case is different.

Q. All right. So what are you looking for?

A. Toxicity.

Q. And what, exactly, evidences toxicity?

A. Well, defects and deficiencies and discrepancies that undermine the right, or ability, of the party seeking to foreclose in any number of manners or methods.

Q. All right.

A. If you look at my Exhibit 9 --

Q. Yeah. We'll get there. We'll get there.

A. You know --

Q. We'll take a look at that. I just wanted

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to get kind of a picture of your methodology real quick. And we'll get to the specifics of this case in a second.

A. The object is that a foreclosure is being brought with truthful - in a manner that is of beneficial ownership, proper chain of title, you know, the financial interests fully disclosed, represented truthfully, the parties involved are being honest. And when we have that, that's beautiful. That's what we want. That's what the industry needs.

And I hope that in my tenure working on the borrower's side, that I can help to promote that flavor in the industry because it benefits lenders, borrowers and everybody.

Q. Okay. So you mentioned beneficial ownership, and I know there's - there may be a lot to that. But I'm interested in your Expert opinion about any differences that you perceive in the ownership of the loan versus the holder of a Promissory Note.

A. Well, do you want to ask me a specific question?

Q. Is that not specific enough for you?

A. The owner --

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Q. Maybe I'll rephrase it.
Do you perceive any difference between the owner of a loan and the holder of a Promissory Note?
A. Well, in the case of Fannie Mae, for example, Fannie Mae is always the owner and holder. The established rule of holder and owner is that you don't necessarily have to be the owner to be the holder.
Is that your question?
Q. Yeah. I mean, I just want to understand your - what your Expert opinion is, and what your understanding is, with respect to - here's my struggle: I'm understanding you to say that the securitization of these loans are being sold, and the securitization - and sold to investors - and that these - is it fair to say that your contention is that these investors actually own the loan?
Is that a fair assessment?
A. You cannot broadly answer a question like that. You must go to the specific transaction, because different cases have to be dealt with differently.
Q. Okay. That's fair enough. So in Mr. Renshaw's case here, then - why don't we go ahead and pull out Exhibit 2.

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If you could, Catherine, provide Exhibit 2 to Mr. Kahn.
And I'll represent to you, Mr. Kahn, that this is the - this is a true and correct copy of the interest only period adjustable rate Note with all allonges and endorsements provided to me by GMAC Mortgage, LLC.
Do you want to just take a minute to look that over?
A. I have examined this document.
Q. Okay.
A. It might appear to a novice that this is a legitimate document, but it's not.
Q. Okay. Can you explain that for me?
A. Well, if you go to Freddie Mac's Selling Guide - I think it's Section 16.4 - you'll find that this allonge doesn't meet the guidelines.
First of all, it's not attached.
Second of all, it identifies a different loan number. The loan ID of 19604557 is not the loan number of the loan. It appears to be little bit doctored from the line items of pool, note date, borrower name, property address - you'll note that borrower name and property address don't have the same format line spacing, which they should normally

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have. It's double spaced. And then that seems to be one and a half spaced.
The use of a handwritten number on the top of an allonge is what I consider to be bogus. But it's what Freddie Mac will consider. The last - and the investor number is not correct. You want to run - and the endorsement is to GMAC. And that is not - but somebody has doctored this. The chain of endorsements is wrong. If you look - you sent over an Exhibit, if I may, that had the Mins; right - the Min Milestone Report.
Do you have that here?
Q. Yes.
A. What Exhibit was that?
Q. That is Exhibit 4. Why don't we go ahead and pull that out?
A. Hold on a second. Thank you for providing the typed Exhibits. Let me see. If you look at the - this is Exhibit 4. If you go to Page 1, 2 - the last page. Hold on a second. It would be - it's not the last page. On the bottom, it says HF000600.
Q. Okay.
A. Okay. So it's the Milestone Report. You'll look at that Milestone Report and, in the second row column from the bottom, you will see that

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the old investor was Residential Funding.
Q. Okay.
A. Then you will go up. Excuse me. That would be the very bottom row - Residential Funding. Then you'll go up, and you'll see the sale, which was Residential Funding to Freddie Mac.
Q. Okay.
A. If you go, now, back to your bogus note allonge, you will see - oh, by the way, in the Milestone, going back to the Milestone, you'll see that GMAC is a servicer - a sub-servicer.
Q. Uh-huh.
A. If you go to your Promissory Note allonge, which was Exhibit 2, you'll see, first of all, an incorrect endorsement to GMAC Mortgage, the servicer. They've endorsed this Note to the servicer.
Q. Uh-huh.
A. When you sell - if you look at Freddie Mac, when you convey a loan to Freddie Mac, according to the guidelines, in the Endorsement Section of their guidelines, it is very specific that the endorsement is going to be from the last owner or depositor which, in this case, is Residential Funding to blank. And Freddie Mac takes

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ownership, based upon that.
So what you have here is a doctored document. That's proof evidence in my mind.
Q. Now, this gets back to my question about the difference between a beneficial owner and the holder of a Promissory Note. Isn't it possible that this Note was turned over to GMAC Mortgage so that GMAC Mortgage was the holder of the Note entitled to enforce it for purposes of foreclosure?
A. If what you're asking is that an investor hands over a Note to a servicer, a sub-servicer - Freddie Mac is the primary administrator, so they are the primary servicer. When they hand over the original documents to a sub-servicer in a foreclosure, for example - is that your question?
Q. Correct.
A. They hand over their documents. They don't sign over ownership because they sold the loan to investors and have no right to sell the loan. Those transactions are REMICs. You cannot --
Q. But you would agree that a holder of a Note and an owner of a loan are two distinct concepts?
A. Not in the case of Freddie Mac and Fannie Mae. Freddie Mac and Fannie Mae are Government

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sponsored enterprises, and they're always the owner and holder of the Notes they take in and sell to investors.
So rather than answer something, you know, that applies to the whole world in every transaction, we can look here to the specific parties. I believe that's probably a better thing to do.
Q. Okay. So then - but I suppose I'm asking a more broad question.
Do you agree, broadly - setting aside Freddie Mac and Fannie Mae's rules and regulations - do you agree more broadly that the holder of a Note and the owner of a loan are two distinct concepts?
A. I think you want to - if you want to get a concept like that, you go to Black's Law Dictionary or --
Q. But you're here as an Expert. I'm asking you in your Expert opinion.
A. Let's say this: If you own something and I'm servicing it for you, let's say in any industry - call it the car industry. You have the title to the vehicle; I'm the dealer; I'm servicing your vehicle and I'm keeping it for the fleet.
If you're transferring the rights to do

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that to me, you may give me the registration. You may give me a copy of your title, but is your question do you, as the investor, sign over ownership in a taxable event to me, as the servicer to own that?
Is that what you're asking me?
Q. No. I'm not talking about ownership interest.
A. Well, that's what this --
Q. I'm talking about entitlement to enforce the Note.
A. Let me just say that your - what you've produced to me to speak on is, it is endorsed - you have endorsed the ownership of the Note to GMAC, the servicer. This is a transfer of ownership here that I'm looking at, which could not possibly take place in a Freddie Mac owned transaction. Freddie Mac is the owner.
Here, in this endorsement that you're showing me, this doctored endorsement, or this conflicting endorsement, is showing that GMAC is the owner.
And you know why they did that? Because MERS' Rules, when you substituted the Trustee, in the Substitution of Trustee, MERS is substituting

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Trustee. That's prohibited under MERS rules. And I've got evidence to that from MERS, and I could show it to you later.
And in order to back that up, GMAC, who is the MERS executive, works for GMAC as an employee, would have to have the ownership of the Note in order to make that claim.
However, in this particular case, they got caught fabricating it. This is misrepresentation of both an intrinsic nature, having to do with it here - GMAC and the MERS Milestone evidence that GMAC is and not was, or is and not possible to own this loan. That's bogus.
That's the first thing.
Q. Okay. Fair enough.
Now, in the event that - you know, in the absence of this special endorsement to GMAC Mortgage, LLC - and, obviously, without the blank endorsement of GMAC Mortgage, LLC, on the back page of the Note there - is it your understanding that that would comply with Freddie Mac Guidelines?
A. No, it doesn't. In this case, to comply with Freddie Mac's Guidelines, the Note here would have to be - first, it would be from Homecomings to Residential Funding, assuming Residential Funding is

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the buyer, which it's evidenced here that it is.
And then the endorsement would be from Residential Funding, in blank.
Q. Right. So --
A. It's not there.
Q. -- as I just described, if you take out the special endorsement, the GMAC Mortgage, LLC, stamp, and you also remove the GMAC Mortgage blank endorsement, it would comply with Freddie Mac's Guidelines; is that correct?
A. No. If you want to roll back the camera, I said that the allonge doesn't meet the guidelines of the 16.4 Selling Guide of Freddie Mac. It's a different loan number.
Q. Explain that again.
A. It's a different loan number. Forget about the handwritten, unidentified party scribble at the top. The allonge is typewritten and barcoded. The known number in the allonge that's typewritten and barcoded doesn't resemble any loan number associated with this transaction.
ResCap is one of the largest securitizers of trillions of dollars of loans. They have millions of these things. Anybody could attach this to anything. This, in specific, is from another

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loan. You can read it right there.
None of the loan numbers - and if you go to the MERS Milestone, and the Min, and the documents, is that loan number. It's being put here to make somebody like a Judge, or somebody that isn't experienced in this industry, to seem to be legitimate. But it's not.
It's not attached to the document - but the use of a random written loan number on top of a printed incorrect loan number is bogus.
Q. Okay. So when you say it's not attached to the documents --
A. That's --
Q. -- I mean, is it a problem that it's a separate page?
A. That's insignificant to the fact, in this case, that it's a completely different loan number. It's a completely different loan number.
Q. Okay. So the reason you believe this to be fraudulent is because of the loan ID number at the top here - the printed loan ID number does not match any loan ID number in the Note?
A. The reason I feel it's fraudulent is - multiple issues here.
Number one, according to the guidelines,

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it should be attached. I don't see that it's attached but, leaving that to the side for a second, it identifies a different loan number typed in to the document.
Q. Okay. But all of the rest of the information is correct to the best of your knowledge; right?
A. It is not.
Q. The loan amount, note date, borrower name?
A. It is not. The chain of endorsement is absolutely wrong.
Q. Well, setting aside the chain of endorsement, I'm talking about the identifying information at the top of the allonge, the rest of that information - note date, loan amount, borrower name, property address - that's all correct to the best of your knowledge; right?
A. I - you've given me a fraudulent document, a document that has been drawn to misrepresent. And you're asking me if certain line items within the body of that document may be correct. And my attention is to the obvious fraud and misrepresentation.
First, the sale identified by the Freddie Mac claim of ownership is the ResCap endorsement to

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Freddie Mac in blank.
Q. Okay.
A. Freddie Mac would be the party that would endorse the loan to GMAC. When ResCap sold the loan to Freddie Mac, they now own it. So if you own something, like the title to your car, or anything else, you wouldn't go back to the party who sold it to you to now endorse it to the party you want to sell it to. You, yourself, would endorse it to the new party.
This is a fabricated endorsement in many -
-
Q. Okay. Fair enough.
MR. STEELE: Just a second. Let Mr. Kahn answer, please.
THE WITNESS: And I'll tell you something else. There's a numbered series on the bottom of these documents, an HF number, that if you look at the Mortgage supplied to me originally, the Note doesn't have any of those numbers.
So I don't know how the copy that you have supplied to me has additional printed numbers over the original, which just had the Homecomings Financial endorsement that I examined in the process of my Stage One Report.

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BY MR. McGEE:
Q. Now, point me to what you're talking about right now - because I'm not seeing it.
A. Hold on a second. I have to - the original Note that Mr. Steele provided for the examination was a Note and rider that was only endorsed on its face by Homecomings from Dorothy Okech who, by the way, I've spoken to. She's now become an Attorney. She used to work in the Mortgage industry.
Q. Okay. Just to clarify, the Note that Mr. Steele provided you, that was a copy of a Note; correct? That wasn't the original Note; right?
A. This is not the original Note. That Note was a copy of a Note, and this is a copy of a Note.
Q. Correct. I just wanted to clarify that Mr. Steele did not provide you the original Note.
A. What I was provided with was a copy. We, at my firm, do not accept original Notes to pay to the order of blank, because those are bearer instruments. And, once you do that, it would be like you signing over your car on the title, and handing it to somebody to examine for servicing, or a report, or whatever. It is wholly inappropriate to do that.

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Q. Right. You would be entitled to enforce the Note as a holder; correct?
A. Yes. If you gave me a Note - well, exactly. Notes are very valuable. That's why they're under lock and key in vaults, and the custodians are under such rigorous stipulations by the parties who entrust bearer Notes to them. They're like bearer bonds.
Q. Sure. Now, you mentioned - just getting back to what you were talking about, you mentioned some numbers at the bottom of the document that were not on the original that was provided to you, or the original document Mr. Steele provided to you. Can you real quickly identify those numbers for me? I'm not seeing them.
A. Yes. On - Mr. Steele, does Mr. McGee have the original Homecomings only endorsed Note?
Q. Yeah. It's part of the Complaint. I'm pulling it up right now, and maybe that will help me figure this out.
A. Okay. Let me see if I can do that, also. I don't know if I have the Complaint. We don't get involved in the legal aspect, but I may have the Exhibit.
Okay. I see it. I've been provided it by

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Mr. Steele in case it would be needed for the Deposition. So let me - yes. That's an 86-page document; correct?
MR. STEELE: What was that?
BY MR. McGEE:
Q. I have the First Amended Complaint, and that's 106 pages. I don't know --
A. Okay. Well, on Page 30 - oh. Let's see. On Page --
Q. Page 39?
A. To me, it's 37, but it's Page - well, hold on a second. No, no, no, no. This Note - let me see where I - please allow me a couple of seconds. I wonder if on my report I included it as an Exhibit. I probably did.
Q. And, to be clear, Mr. Kahn, I just want to make sure you're not referring to the HF000767 number in the bottom right-hand corner, because that's a number that we - it's called a Bates number - that we added to the document to identify it as part of a production for discovery.
So to the extent that that's the number you're referring to, you can simply ignore that. That certainly is not a number you need to pay attention to, unless we need to look at it for

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reference.
But I'm looking at the First Amended Complaint, and the Note that was attached to that one, which I presume is the same Note Mr. Steele provided to you. And I'm not seeing the number - any different number.
A. Okay. So that explains it. But that Note that I saw just had the Homecomings by Dorothy Okech. I think it was D. Okech.
Q. Sure. Yeah. Right.
A. Okay. So that answers what that number is. In my mind, if I'm looking at misrepresentation, when I see a number like that placed on the what I call bogus allonge, would make me think - had I not be who I am - that that allonge came in sequential order to the Note.
And you're making it clear to me that it's not. It's only because you placed it behind there. I want to --
Q. No. That's - the allonge - the copy of the allonge that was provided to me in this order was the allonge at the back. I don't have the original Note here at my offices. But this is the true and correct copy they certified, and testified under oath in an Affidavit that this was a true and

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correct copy of the original Note.
A. That's a lie.
Q. Okay.
A. The reason why it's a lie is, you cannot - I could testify. Let me see how I could phrase this. If you're committing something that's easily exposed as fraudulent, you could testify all day to it. But that doesn't make it legitimate.
In other words, you break in to a drug dealer's house, you can't now have a drug dealer go in to Court and complain that, oh, he broke in to my house for drugs, or whatever. I don't know if that's a good analogy but, right here, you've broken the law. You've fabricated a document that cannot possibly be true, and it's evidenced within your own documents to be fabricated.
So the fact that they testified about it in an Affidavit just adds another document of misrepresentation, presumably, in a Court setting.
Q. Now, if - let me ask you this, then: If that Affiant showed up in Court and held up the original Note with all of these documents - or held up this document, the original, not a true and correct copy, but the original, would that change your mind as to its admissibility?

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A. You know, I've tried to be very clear to you. And I sense you're a very knowledgeable and educated man. I have said to you in numerous occasions, and I could say already asked and answered numerous times, but I'm going to presume that you're not getting it because you're asking me again.
So I'm going to run through, out of courtesy --
Q. I'm not asking you - you keep telling me it's fraud. You keep speaking in generalities --
A. No.
Q. -- about the fraudulent nature of this document.
You've gone over the fact that the loan ID number is different; you've gone over the fact that it does not meet Freddie Mac's Guidelines.
Now, what I'm asking you is, setting that aside, if somebody showed up with the original of this Note, is it your contention that it would not be enforceable by that person?
A. It is - in the manner before me that you have given to me, with the endorsement allonge and then the pay to the order of blank by GMAC?
Q. Yes. And, just to be clear on my

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hypothetical here, let's hypothetically say that it's a GMAC Mortgage Representative who shows up with the Note.
A. The MERS --
Q. Is it enforceable by GMAC Mortgage?
A. The MERS Milestone evidences a sale from ResCap to --
Q. Okay. Let's --
MR. STEELE: Let Mr. Kahn answer the question.
MR. McGEE: Mr. Steele, he's evading my - I'm asking him a very simple yes or no question.
THE WITNESS: I answered to you before --
BY MR. McGEE:
Q. I'm asking for a yes or no answer here. Is it enforceable by a GMAC Representative, if they show up with the original of this Note in Court?
A. I cannot give you a legal opinion. I'm not an Attorney. I can only say that it is a doctored, fraudulent document.
Now, whether or not a Court, or a Judge, or Attorneys, or anybody, would lend legitimacy to a fabricated, fraudulent document that is so easily contradicted in an undisputable manner due to the nature of the source of the evidence that

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contradicts it, if you're asking whether or not I'm willing to make a legal opinion, I am not qualified to do that.
I can only answer to you that upon which I am an Expert, or considered to be an Expert in, and that is outside of the scope of my ability to respond. I'm not avoiding your question. I just can't answer a legal question. I'm not a Lawyer.
Q. Okay. Are you familiar with - are you an Expert on the Uniform Commercial Code?
A. I am familiar with the Uniform Commercial Code. But, again, that is normally the realm - let's say, ask Nick Wooten about the Uniform Commercial Code, or ask Max Gardner, or ask Attorneys. That is usually a legal opinion.
I'm a forensic securitization investigator and analyst, and I can only bring to you my observations and the evidence upon which supports my statement because I'm under sworn oath against perjury, and I am saying to you that I believe this document is fraudulent.
And if you're asking me if somebody came in with this fabricated, fraudulent document in their hand, is it enforceable - is that what you're asking?

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Q. Yeah. That is what I was asking. Yes.
A. I don't know that - I can't - I've already told you I'm not an Attorney. I don't know --
Q. Okay. That's fair enough.
A. I don't know the --
Q. And my next question was about the UCC. Are you familiar with the endorsement requirement in the Uniform Commercial Code?
A. I am familiar with UCC-3 and UCC-9.
Q. Okay. Now, are you familiar with the endorsement requirements under UCC-3?
A. I am not going to respond further to you about the illegitimacy of a fabricated, obviously fraudulent endorsement, and whether or not a fraudulent, fabricated endorsement is going to be compliant under any rule at all. It's fraudulent.
Q. Well, that's kind of what we're here about. You're alleging fraud without actually - there's no basis for the allegation.
A. The allegation --
Q. I mean, I understand you've testified to the facts about - you've testified to the facts of the problems you see here, but you're drawing a conclusion that it's fraudulent, and it seems that you don't even - it seems to me that this issue over

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endorsement is made based upon an understanding of the UCC's endorsement requirements, but you aren't willing to speak to those issues because it's a legal issue.
So what I'm asking you is, if you're not going to opine on legal issues like the requirements of endorsement under the UCC, how can you draw the conclusion that it's a fraudulent document?
A. Well, that's relatively simple. Freddie Mac claims ownership. The MERS Milestone you provided in to evidence confirms the chain of ownership from ResCap - excuse me - from Homecomings to ResCap, and Freddie Mac claims ownership.
So the endorsements that we expect to see are Homecomings, stamped Residential Funding - which we see; and then Residential Funding, in blank, and then Freddie Mac - and that's what we see.
Now, what you're showing is, somehow, that GMAC - that Freddie Mac, who securitized this loan under the Government sponsored enterprise rules and guidelines allows, or presumes, for GMAC, or for Residential Funding, to endorse it to GMAC is preposterous.
Now, let me say something to you: The issue of misrepresentation in the documents - this

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document and that transaction in that manner - and the extrinsic nature of preventing the truth from coming out, the Note evidences what is called defects and conveyances according to Freddie Mac.
Freddie Mac requires the sellers to repurchase such loans at full face value. GMAC is apparently servicing the loan because your Milestone reports that. And ResCap and MERS are the interim parties as nomineed by the assignment from Homecomings, which is also an affiliated company.
MERS specifically authorized the servicer's employer - well, listen, Freddie Mac must comply with their guidelines. And so if we were to see that GMAC was going to be the new owner of this Note, that would then be Freddie Mac to GMAC.
If Freddie Mac, which they can, wanted to provide to its servicer, or sub-servicer, which they can, documentation upon which to conduct a foreclosure, which they can, the documentation that they would provide would not be endorsed to them.
It would be Freddie Mac's holder in due course, originals, documentation, made out to them. And then the holder, meaning the servicer of Freddie Mac's properly endorsed and owned documentation, would be able to conduct a foreclosure, and Freddie

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Mac would be a party to that.
They authorized services to conduct the foreclosure, but the way you've presented it, you don't even recognize why. And it's for something that has to do with your Trustee - your Substitution of Trustee, and that chain.
But this document is not what the holder, who was wishing to do anything, would provide. You wouldn't provide the Note signed over to the car dealer in order to service your car. You'd just give them a copy of your Note, or you'd give the original, if it was valuable under certain circumstances like that.
That's what I would expect to see - a true, honest foreclosure in this case, if GMAC was the servicer, which let's agree they are - it's in the MERS Milestone - and then what we would see would be the pay to the order of, in blank, from Residential Funding.
Q. Okay.
A. I mean, this is simple. You know, you're making it very complicated.
Q. I'm not. And I think perhaps the confusion arises because - I will represent to you that GMAC Mortgage did buy back this loan from

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Freddie Mac in order to be able to offer Mr. Renshaw a modification during the course of this litigation. And because Freddie Mac - he did not meet Freddie Mac's requirements to provide him with a modification.

So they actually bought it back, and maybe that's why we have this additional endorsement from GMAC Mortgage, LLC, and then an endorsement in blank.

Now, I understand from your prior testimony that you would expect to see a pay to the order of Freddie Mac from Residential Funding, and then a separate pay to the order of GMAC Mortgage from Freddie Mac. Is that fair?

A. It would be pay to the order of, in blank. That's what the Freddie Mac guideline is. You could make it to Freddie Mac, but the guideline is in blank. The incongruent aspect of what you're stating is - and I don't see that reflected in the MERS Milestone, and I still see Freddie Mac claiming ownership of this loan, so --

Q. Well, fair enough.

MR. STEELE: Let Mr. Kahn finish, please.

THE WITNESS: I consider what you're stating to be a bald claim. But I'd have to see it

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in evidence. What I see here is fraudulent because Residential Funding sold the loan to Freddie Mac.

Why is Residential Funding stamping the loan to GMAC? That is illegitimate. It's a mistake. It often happens in document fabrication.

BY MR. McGEE:

Q. Well, I guess - and to be clear, I understand what you're saying. Residential Funding Company should have - now, okay. Let me ask it a different way.

A. I'd like you to pause for a second, because I want to be clear. The questions and the line of questioning that you're asking me may tend to lend legitimacy to the allonge to the Promissory Note because that is where this Residential Funding endorsement is that we are speaking back and forth here about.

But I've already stated to you that I believe that that document, in itself, is fraudulent because Freddie Mac would never have - this did not meet the guidelines upon which Freddie Mac could buy it. It's got the wrong loan number on it.

This is a - this was a blank endorsement from some other loan in the millions and tens of millions of loans that Residential Funding has

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conducted.

Q. Okay. So let's go down that line. If that, in fact, is the case, what results?

A. What results is that - technically speaking, what would result from the Freddie Mac Guidelines would be the discovery that this was a defective loan conveyance, and Freddie Mac would sell - one of the parties here would have to buy that loan back from Freddie Mac, and then they could do with it what they wanted.

Q. So is it your Expert opinion that if we disregard this allonge, the Note may still be enforceable?

A. As I've said to you before, an illegitimate document is an illegitimate document. If a Note is properly endorsed, it would be enforceable. If a Note is fabricated, falsified, forged and misrepresented, then it is unenforceable.

If the example is, well, what if I roll it back and make it enforceable, well, I guess then it would be enforceable. But, in this case, it's not. And there is a reason why MERS has done this? MERS has done this premeditatively, in my opinion, but the facts speak to themselves.

MERS has made a very big mistake here that

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you haven't touch on.

Q. And what would that mistake be?

A. That mistake - well, let me think for a moment. First of all, they have committed what is an act that is prohibited under their rules. Let me get something out of my case file, if I have it on MERS.

Q. This may help you. Deposition Exhibit 5, if we could get that in front of you, those were the rules - I will represent to you that those are the rules in effect when Mr. Renshaw's foreclosure was initiated, if that helps you out at all.

A. Those rules do not - those rules that you submitted are self-serving to your cause, but they do not address the infraction that I have discovered. And I'll address to you the MERS writings that pertain to my finding in a moment, if you'll allow me.

Hold on one second. I have to go in to my MERS folder if you don't mind. May I access my MERS library folder?

Q. Sure. I would ask that you provide anything that you're going to review to Mr. Steele, or myself --

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A. Okay.
Q. -- you know, after the Deposition.
A. Okay. I'll create a different - MERS issued a - what's called an Ohio Federal Court Opinions and Orders in Mortgage Foreclosure Actions writing. It was a notice --
Q. Did you say Ohio?
A. It's in Ohio. And I'm raising this issue because it says, "Two fundamental elements that must be pled at the commencement of a foreclosure action is that Plaintiff is the holder, and Plaintiff is the mortgagee of the mortgage that's being foreclosed."
So what you've got here is, MERS is making a claim by the blank endorsement of GMAC that MERS is the owner and holder of the Note, and the Mortgagee under the Deed of Trust. That's why they've done that. That's why they modified it, because the Substitution of Trustee is done as if MERS was the lender.
Q. Okay.
A. Normally, if MERS was not doing that, had not made that critical mistake, which is misrepresentation because they've doctored this whole thing and now they got caught red-handed, what

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they would have done is make an assignment first. MERS would assign to somebody to a party. But they didn't do that.
They're taking actions in - against the MERS rules, and representing that they're the owner, holder, of the loan, and substituting a Trustee who has taken Trustee actions against the interests of this borrower.
Q. Okay. Now, I want to be clear about something.
Is it your contention based on the documentation that MERS is representing it is the owner of the loan in addition to being the holder of the Note?
A. Well, if you go to the Substitution - where is your Substitution Exhibit?
Q. It's Exhibit 6. Catherine, go ahead and hand him Exhibit 6.
A. Hold on one second. There are some critical problems with this Appointment of Successor Trustee upon which all related actions have rippled down.
First of all, the first paragraph states that MERS is taking actions for Homecomings. But when you look at the date in 2010, it is after the

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date that the loan was sold, and Homecomings was no longer the owner.
Residential - I'll call it ResCap - was the owner, and/or Freddie Mac was the owner. If I was a novice to read this - maybe somebody that is not able - you know, doesn't have the experience would read this, and it would look like MERS is taking beneficial ownership interest actions on a Note and Mortgage Deed of Trust which is not - which it has rights to do because, under the MERS rules, if MERS is in possession of a Note endorsed to the holder in blank, then it can do that.
So MERS could do that, except for one thing. In this case, it's been fabricated, and we've gone through that. But had MERS been holding a Note that was - you know, they were now holding a Note endorsed in blank, well, then, they could take an action to substitute a Trustee. If you go in to the Deed of Trust, only the Lender can - typically, in Deeds of Trust, only the Lender can substitute a Trustee.
A servicer, or an electronic registration system designed to facilitate the recordation of services and transfers of the Deed of Trust, itself, cannot - is not the Lender.

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Besides, this Lender, if you look at the FDIC report and investigation, this Lender had ceased to do any lending business in 2009, according to the evidence of the FDIC investigation.
So MERS is taking actions for a party who is not the owner, because the endorsed Note is different, at a date after that party is basically defunct in terms of lending, and is - wants us to believe that it has the rights, this employee of GMAC, Donna Fitton, and the other employee, Sally Beltran, which I'm very sure Sally's Notary address is that of GMAC.
These are GMAC employees. They're now taking actions based upon that bogus endorsement to GMAC. But ResCap never had the rights to transfer the loan they already sold to Freddie Mac to GMAC. So that's why it's bogus. Somebody just stamped it on there in purple ink.
Q. Okay. So if I'm understanding you correctly - and please correct me if I'm wrong - Donna Fitton, who executed this Appointment of Successor Trustee as an Assistant Secretary of Mortgage Electronic Registration Systems, did not have authority to execute this appointment because the loan was owned by Freddie Mac; is that correct?

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A. The MERS membership rules and foreclosure procedures require that the Note be endorsed in blank and in the possession of a MERS Officer or its Foreclosure Counsel to do what this party has alleged to do.
Q. Okay.
A. Because we can - from a forensic standpoint, we've determined that the evidence clearly shows that the endorsement to GMAC upon which - the endorsement to GMAC is wrong, not only that it's on a fabricated, incorrect allonge, but that the endorsement stamp on the Note of, in blank by GMAC, is done by a party that has not evidenced legitimate legal transfer receipt acknowledgment of.
So what you have is, they put a couple of bald claims - they put a rubber stamp on there, boom. Hey, now I own it. This party is saying, okay, I'm just signing without having looked at any of the documentation.
Donna Fitton doesn't realize, perhaps, that she's committing misrepresentation of fraud here, because I'm sure she wouldn't sign it. She didn't investigate it - nobody asked me.
And so now, what you've got here is a clear case of fabricated ownership for the purpose

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of bringing a foreclosure that would appear to be legitimate in Court, falsifying documents, and fabricating at will in a manner that is not - that Attorney Generals have called unlawful.
Q. Okay. So do you have any evidence that Donna Fitton did not actually have a blank endorsed Note, or have knowledge that GMAC Mortgage held a blank endorsed Note when she executed this appointment?
A. Well, I presume that the blank endorsed Note to GMAC is the one you've given me. There is a blank endorsed Note to GMAC.
Q. Okay.
A. But it's stamped in a manner that's just a bald claim. This is not the proper chain of title. It's illegitimate. It's coming from ResCap, which they already sold it to Freddie Mac. And if the loan is sold by Freddie Mac, it would be Freddie Mac.
When Freddie Mac sells a loan back to a servicer, do you think an old seller is the one who signs the endorsement to that party, or do you think Freddie Mac signs it? What would you do? What would make sense to you?
Q. Well, I mean, I understand what you're

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saying. You're suggesting that there would be another endorsement. There would have been a - Freddie Mac would have endorsed the Note, would have stamped the Note to Freddie Mac, and then would have executed another endorsement from an Officer of Freddie Mac to whoever they sold the loan to.
Is that what you're contending?
A. You know, that is conjecture. The facts speak for --
Q. Yeah. But that's what you're operating on here. According to Freddie Mac's Rules, as you understand them, is that what would have occurred if it was done appropriately?
A. Freddie Mac, as the administrator, has the right to authorize other parties to do - and they're also the Trustee in their deals. So Freddie Mac, as the Trustee, could really do whatever they want to do.
Q. But could they authorize GMAC Mortgage, who is servicing a loan, to stamp GMAC Mortgage on a special endorsement from Residential Funding, in the event they sold the loan to GMAC Mortgage?
A. I don't know that I can answer that question.
Q. Well, you're speaking about Freddie Mac's

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authority. So is the authority that Freddie Mac has to authorize, you know, its servicers and sub-servicers to take certain actions - so what I'm asking you is, with that authority, in your Expert opinion, would Freddie Mac have the authority to authorize the endorsements as set forth in the Promissory Note before you?
And I understand it's conjecture, but that's what we're here for, is your opinion.
MR. STEELE: Well, Mr. Kahn is giving his opinion as to what the guidelines are.
MR. McGEE: Well, I mean, the guidelines probably speak for themselves. I'm testing his knowledge and opinions, and I need his opinions about what authority - I mean, he's suggesting it doesn't comply with Freddie Mac's Guidelines, and then he's unwilling to speak to Freddie Mac's Guidelines.
MR. STEELE: Well, you're asking him to answer a hypothetical that - could this be possible? And I guess it could be possible that the sun doesn't rise tomorrow, but it's not likely.
THE WITNESS: Let me --
MR. McGEE: Well, that's what I'm asking him to answer.

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THE WITNESS: Excuse me --
BY MR. McGEE:
Q. So, Mr. Kahn, having heard that exchange, is it possible that Freddie Mac authorized GMAC Mortgage, when they sold GMAC Mortgage the loan - which I will represent was within the last three or four months - is it possible that they said, go ahead and stamp it to GMAC Mortgage; we don't need to execute a separate endorsement from Freddie Mac?
A. You know, when I'm confronted with a request, I guess, at a Deposition to identify a reliable authority like you're asking me to do, I really think that I can say that I need to determine whether a particular aspect is reliable on that point.
And I have mentioned to you - because you're trying to give credibility to documentation I don't believe Freddie Mac would have purchased, or would have been proper documentation.
In other words, it's an allonge to another completely different loan. Would Freddie Mac have a completely different loan's allonge making an endorsement to GMAC; is that your question?
Q. My question is: Would Freddie Mac, assuming they owned the loan and sold the loan to

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GMAC Mortgage, is it possible that they authorized GMAC Mortgage to simply stamp it, to specially endorse it to GMAC Mortgage so that GMAC Mortgage took possession and ownership of the Note?
MR. STEELE: Let me ask something. Mr. McGee, you said this just happened in the last three or four months. Is that what your statement was?
MR. McGEE: Yes.
MR. STEELE: So the transfer - you're saying that Freddie Mac transferred Mr. Renshaw's loan to GMAC within the last three or four months?
MR. McGEE: It's reflected in an Affidavit. I think - I mean, we're a little off topic here, but yes.
MR. STEELE: And when did that happen?
MR. McGEE: That happened when we were trying to get you a loan modification because Freddie Mac refused to - they twice rejected your client's application for a loan modification.
And they were trying to work with you and get you the best deal possible, so they purchased the loan in an effort to provide you with a loan modification option. And so, at present - and this is all reflected in an Affidavit.
I can point it out to you at a later time,

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but they purchased the loan in order to offer him a loan modification.
MR. STEELE: And so?
MR. McGEE: And that's, perhaps, part of - you know, I understand that Mr. Kahn's testimony is that this Note is just simply fraudulent on its face, but what I was getting at earlier, and what I was trying to describe, is that perhaps this endorsement to GMAC Mortgage - because this is the current original Note - reflects that sale, that recent sale from Freddie Mac to GMAC.
THE WITNESS: Well, you know what? That makes it much easier for me to answer.
BY MR. McGEE:
Q. Okay.
A. And that would be that, if that was the case, let's see the bank statement wire for the loan payable at the time of transfer, and couple that to the documentation, and submit that. Then I would be able to analyze that a little better.
Because a bald claim upon already presumptively fabricated documentation to exhibit to be credible is not enough at this point.
Q. Yeah. And I understand your position, but you certainly aren't contending that an endorsement

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on a negotiable instrument is nothing more than a bald claim; are you?
A. Hold on one moment. I need to reference something.
MR. STEELE: Mr. McGee, let me ask you: All these endorsements are undated. Which endorsement is the last endorsement?
MR. McGEE: Well, I mean, maybe we can speak with Mr. Kahn about it, but it looks to me like there's a blank endorsement on the signature page from GMAC Mortgage; right?
I mean, so if you follow the chain of those holding the Note, whoever holds this Note - based on my understanding of the UCC, whoever holds this
Note is entitled to enforce it because it's a blank endorsed Note.
Is that your understanding, Mr. Kahn?
THE WITNESS: If the chain of endorsement is legitimate from party to party, and not contradicted to the legality, I would say that it would be - I can't give a legal opinion, but --
BY MR. McGEE:
Q. I understand.
A. -- but I would say that a Note that's

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properly endorsed, negotiated, delivered, accepted, paid for, that has an endorsement - if I wanted to see if the title of something you, Mr. McGee, sold to Mr. Steele, I would look at it and I would want to authenticate it.

I'd want to ask for Mr. Steele's record of payment for it. Show me the cancelled check; show me the wire transfer; show me something that proves it.

Q. And I apologize to interrupt, but isn't that what this is? This is a Note. This is a negotiable instrument, much like a check. That's what you need to authenticate a document; is that not correct?

A. Where's the proof that - where is the Affidavit of Proof stating when, where, how, why the negotiated payment, for how much, and when, where and why - where is that?

Q. Yeah. No. I understand your question, and this kind of goes back to my questions about the Uniform Commercial Code and, specifically, Article 3. I am aware of no requirement that all that documentation be introduced under UCC-3.

And if you are, I would like you to tell me about that. I understand that your job is much

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easier as a Forensic Auditor, if you had all of that documentation. What I'm asking is, for purposes of determining the legal validity of a document, and for purposes of enforceability, all of that documentation is not necessarily required under UCC, Article 3; is that not correct?

A. The documentation upon which I have based my investigation does not include any claimed sales or purchases of GMAC. You've got an allonge that is obviously to a different loan from a different party, and if you're going to state that a mere stamp faced with that is evidence of ownership, I'd have to say it's not.

And then, I'd also ask you, where is the original Deed of Trust? You've given me a copy - you've given me what looks to be an original of a Note because it's blue ink, and purple, et cetera, but the copy of the Deed of Trust is in the facsimile black ink, or whatever. Where is the Deed of Trust?

Q. Maybe we can clarify that. I think you should probably look at the first page of the Deet of Trust. Let's go ahead and get Exhibit 3 in front of you.

The first page of the Deed of Trust that I

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provided you is a recorded document, which I have to understand is really kind of a critical document and the fact that it is recorded - which is probably why it was provided to you.

So take a look at Exhibit 3, and maybe that will provide some clarity with respect to your question about the original Deed of Trust versus the recorded Deed of Trust.

Now, does the Deed of Trust have a recording stamp on it?

A. Yes, it does.

Q. Okay. And does the Deed of Trust provide - does that Deed of Trust appear to be the same Deed of Trust that you reviewed in making your report? And you can take a couple of minutes to look it over if you'd like.

A. Okay. It does.

Q. Okay. Let's turn to Page 2. Subsection E provides that "MERS is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender, and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument."

Pertaining to what I just read to you, is that an accurate statement of what Page 2,

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Subsection E provides?

A. It doesn't change my opinion of the Appointment of Successor Trustee because that was done in August of --

Q. I understand. I'm just simply asking you - I'm running down a line of questions here, and we'll get to the substance in a second.

But those two lines that I just read - those two or three lines that I just read, that's what is reflected in Exhibit 3 here on Page 2, Subsection E; is that correct?

A. That MERS is the nominee for the Lender?

Q. And the Lender's successors and assigns?

A. Yes.

Q. Correct?

A. Yes. It states that here.

But may I suggest that you go to Item 24, which is on --

Q. Well, can you just answer that question?

MR. STEELE: He already answered it.

MR. McGEE: I didn't hear it, and maybe that's part of the problem with this telephonic thing.

THE WITNESS: I said --

BY MR. McGEE:

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Q. Does the Deed of Trust provide that MERS is acting solely as the nominee for the Lender and the Lender's successors and assigns?
A. It states that in Item E, yes.
Q. Okay. And does it also provide that MERS is the beneficiary under the Security Instrument?
A. Yes. Would you like to describe to me what you consider that to be in this case?
Q. No.
A. Okay. Can I ask you a question?
Q. No.
A. About the Appointment of Successor Trustee document we were talking about?
Q. We can get back there in a second, but let's run through this Deed of Trust real quickly.
A. Okay.
Q. On the next page, Page 3, the Deed of Trust provides in the second to last paragraph, after describing the property and again designating MERS as the beneficiary, it states "All of the foregoing is referred in this Security Instrument as the Property. Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument but, if necessary to comply with law or custom, MERS, as

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nominee for Lender and Lender's successors and assigns, has the right to exercise any or all of those interests, including but not limited to the right to foreclosure and sell the Property, and to take any action required of Lender, including but not limited to, releasing and cancelling the Security Instrument."
Can you tell me what that means to you? In your Expert opinion, what is the meaning of that provision there?
A. As nominee for the Lender, MERS will perform what it's told to do.
Q. Okay. Do you also understand the provision to provide that the Borrower understands that relationship and agrees to it?
A. That's what the text says.
Q. Okay.
A. I don't know if you're asking me whether Mr. Renshaw, who is a paraplegic, understood it. I can't --
Q. Well, what's your understanding of Mr. Renshaw's mental capacity? Does his paraplegia affect his ability to understand legal documents?
A. I cannot comment because I don't know. I would assume that - I can't assume. So I don't know

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Mr. Renshaw; I don't advocate for him; I have no idea of his mental capacity. I've only spoken to his Attorney.
I do know this, because my expertise is also in forensic loan analysis, that - in my opinion from the facts, I've looked at the loan application from Colonial, and I believe that, based upon the type of loan that Homecomings sold to Mr. Renshaw, the type of pricing, over par pricing that they skewered him on, and the apparent misstating of his income - you know, he's a guy on Disability, to be making five and a half thousand, or whatever it was, dollars per month, would indicate to me that it was more of a sales job than reality.
There is a loan provided to Mr. Renshaw that was absolutely premeditatively designed to foreclose.
Q. Okay. Well, I'll tell you, also, only because - and maybe this is a good opportunity - what is your understanding of the issues that remain in this litigation?
A. I have no idea of the issues in this litigation, except that --
Q. Is it your understanding that origination issues are still part of the case?

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MR. STEELE: He just told you that he did not have an understanding of what the remaining issues are.
THE WITNESS: I have not reported - I have not been asked to report on origination issues, of which I'm qualified to do, should anybody decide to have me review those documents and give a written report on it.
But having been a Lender for, you know, a number of years of substantial amounts, and having underwriting authority and quality control, I would never have permitted such a loan to be given to a Borrower without evidencing the ability, or the additional income, which I would perceive.
So I've never issued a loan when I was an active Lender that had been defaulted, or bought back, or whatever. And it just is apparent that the loan was issued to - and it would default. You can't give a --
BY MR. McGEE:
Q. Well, just so we can be clear. Those issues are not really at issue in this litigation. I'll represent to you that the sole remaining claims as against MERS are negligence in the commencement of foreclosure and violation of the Idaho Consumer

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Protection Act.
And there's no claims remaining as to the origination of the loan, or whether Mr. Renshaw should have been qualified for a loan to begin with.
A. That wasn't the reason that I mentioned it.
Q. Okay.
A. I mentioned it because, in terms of settlement, when you talked about settlement - and I've been an Expert assisting in litigation, mediation and settlement negotiations. It becomes questionable as to what a Borrower with a $1,400 a month income can afford to pay.
If you were to provide a 31 percent back-end ratio on that, you'd figure 30 percent of $1,400 would be about 400 and something dollars that a Borrower could pay on their entire mortgage payment. This is a quarter of a million dollar loan.
So when you say you had a loan modification earlier, and that was addressed to me, I started to think about, well, what kind of loan modification can you give to a Borrower who's got a quarter of a million dollar loan, and can only pay 400-something dollars a month?
Q. Well, you know, I'm not an Underwriter.

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You can potentially take that - you can potentially request that Mr. Steele provide you the terms of the modification offer. So I'll leave that for the time being, and you can address that with Mr. Steele at a later time.
So turning back to the Deed of Trust, why don't you go ahead and turn to Page 10.
A. Page 10 of 15?
Q. Yes. So Paragraph 13 there provides - in the second paragraph, it says "Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind, except as provided in Section 20, and benefit successors and assigns of Lender."
Do you have any opinion as to the meaning of this provision?
A. You know, you're drawing me in to an area that I don't respond to. Because I can read the

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text that you're reading to me, and I'm giving you the consideration of acknowledging the text that you're reading to me, but I've made it clear, this is a legal document. So - I'm not a Lawyer.
So the relationship of what you're asking me to legalese, and my interpretation of legalese, and what it means to the case, is inappropriate. I'm not going to answer it. It's not --
Q. Okay. Why don't we go ahead and get Exhibit 9 in front of you.
A. What I would like to - what I would address is an issue that is within my realm, and there's only one in this document. If you wanted to, I would address it. And it's on --
Q. Well, why don't we go ahead and address that. What is it?
A. It's the Number 24.
Q. Okay. So you're suggesting that you have some expertise related to Paragraph 24, but you aren't willing to comment or provide any Expert opinion as to the rest of the text in the Deed of Trust; is that correct?
A. It's not that I'm commenting on - that's correct. It's not that I'm commenting on the legality of it. It's just that the Substitute

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Trustee is that the Lender may do it. And when I look at your Substitute Trustee, and the forensic - in the process of forensic analysis, we look to Item 24 in the Deed of Trust and we say, who can appoint a Successor Trustee?
And then, in the Appointment of Successor Trustee, I see that it's not the Lender. I see that it's MERS, acting as a nominee for the Lender, but that Lender is out of business according to the FDIC in 2009.
And then, according to the Note endorsements, the loan had been sold at origination to Residential Funding. So Residential Funding is not mentioned in here, and I see MERS now taking actions on a party that is not the Lender. And that, I see, is a misrepresentation.
Q. Okay. Now, let's - and I understand what you're suggesting about the fact that it references Homecoming. Let's - again, I think we need to return to Page 3, which provides that Renshaw agrees and understands MERS' role, and that MERS has the right to exercise any or all of the interests delineated, or take any action required of Lender.
So I guess I'm not seeing, in your forensic analysis, you examine the ability of MERS

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to take action for the Lender. What I understand you to be doing is saying, well, only the Lender can do a Substitute Trustee.

But then, if you turn to Page 3 of the document, it provides that the Lender can have MERS take certain actions. So I'm just asking you to maybe comment on that issue, and then I think that's part of why I ran you through the text of the document - is to test whether you really are looking at all of the angles here.

So I suppose my question is, in light of the fact that a Lender can have MERS take certain actions in its name, does that change your analysis with respect to this Paragraph 24?

A. You really have to go to the MERS Rules - because I don't make the rules. MERS is a membership organization, and MERS makes the rules.

Q. I understand, but you also have to understand that the MERS Rules are not - they don't apply to Mr. Renshaw, and that's not what this litigation is about. This litigation is about Idaho law and violation of Idaho law.

So to the extent you need the MERS Rules to do your forensic analysis, I would - I mean, you can certainly refer to them, and go ahead and do so.

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I'm just telling you, the MERS Rules are not on Trial here.

A. But what I'm trying to say is that - I think it's already been well settled that, MERS here would be claiming to be acting for Homecomings. That's what it says. Homecomings had, according to the FDIC, stopped lending in 2009, a time before this had happened. So MERS requires written instruction, to my knowledge - written instruction from the Lender.

So are you saying that the Lender gave written instruction to MERS to do this? Well, according to this, Homecomings was not a Lender, and ResCap had already bought it and sold it to Freddie Mac. I don't see those parties involved here giving MERS any written or otherwise directed.

MERS' stated Rules require direction by the Lender or their assigns, directing them to convey land title, or Deed of Trust, or whatever. And how could they provide written instruction to MERS, or this party, Donna Fitton, or to anybody, to transfer titles to Deeds they no longer own?

I think it's an intentional and direct fraud on the Court, and on the party that's being foreclosed upon. That's what I think.

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Q. Fair enough. So we've got Exhibit 9 in front of you. Why don't we just go ahead and - let's get Exhibit 8 in front of you, as well, and we'll start with Exhibit 8.

A. Exhibit 8 is --

Q. Exhibit 8 appears to be a Forensic Lender Discovery Document Review and Assessment dated December 22nd, 2010. Do you have that in front of you?

A. Yes.

MR. STEELE: Mr. McGee, can I ask - just to interject something here. Any time, Mr. Kahn - we've been at this for how long? An hour; is that right?

MR. McGEE: It looks like, actually, a couple of hours.

MR. STEELE: A couple of hours?

MR. McGEE: Do you need a break?

MR. STEELE: I was going to ask. Yeah, a break is sometimes a good idea.

MR. McGEE: Okay.

MR. STEELE: Could we take about a five-minute break, or maybe make it a ten-minute break so that everyone can take care of a few items, and we'll get back together; is that all right?

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MR. McGEE: Sounds good to me.

(Thereupon, a brief recess was held off the record.)

BY MR. McGEE:

Q. All right. So we're back on the record here. I had - before we went out, I'd asked Ms. Fitzpatrick to hand Exhibit 8 to the witness.

And, Mr. Kahn, this is your Forensic Lender Discovery Document Review and Assessment; is it not?

A. Yes. Yes, sir.

Q. Does it appear to be a true and accurate copy?

A. Exhibit 9?

Q. Exhibit 8.

A. Yes. This is just an Assessment. It really shouldn't be in the Court. It's not designed for submission in to Court - I guess that it is. It's just the preliminary - would you like to know what it is?

Q. Yeah. That would be great.

A. Some years ago, because there is a cottage industry of pretender auditors and experts around the Country, rather than just take any old case that is willing to throw their money at us - which is

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pretty much everybody - we endeavor to asses the case initially for a small fee, and look to see if there's any toxicity that we can make out.

And if there is, well, then we invite them to make - order a full report, either Stage One, Stage Two or Stage Three.

So, in reality, all the Assessment does is give, basically, an approval of the submission. And then, when the party decides to what we call upgrade, then part of their - a good portion of whatever it is that they've spent gets applied to any upgrade. So it winds up not really costing them anything, or very little, for it.

And we do that to prevent us from taking cases that we can't really make hide nor hair of.

Q. Okay. So how often would you say do you not approve, or do you not invite further investigation in your business?

A. A lot.

Q. A lot?

A. To the extent that we don't even permit anybody to make an order without a specific entrance code.

Q. Okay. So now, maybe I should narrow the scope. In the context of residential home loans,

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about how many - let's put it in percentage terms. About what percent of people that come to you and get this kind of initial assessment, what percentage do you invite to order a further assessment?

A. Well, the initial assessment is only performed after a verbal interview, and maybe - you can't go in and order on our website. I don't know if you've been at the website - well, by your responsive pleading to have me dismissed, I saw that somebody went to the website.

But if you want to place an order with us, the first thing you'll do is you'll make inquiry. And then you'll speak to me, or my assistant, or somebody, and we'll - if there's any question about it, a lot of those cases, so maybe we get ten calls a day, because I'm all over - I have an established reputation.

So maybe we get, I don't know, five to - I like to be on the conservative side, so let's say we get at least five inquiries a day. I think we only take about four to five new orders a week - maybe a little less; maybe a little more. So it's --

Q. So you only take approximately one in five inquiries. Now --

MR. STEELE: Just a second. Let him

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answer the question.

BY MR. McGEE:

Q. Did you have anything further to add to that?

A. No.

Q. Okay. So, roughly, you take one in five inquiries. Now, do you do one of these Document Review and Assessments for each inquiry, or just for the one in five that you actually take?

A. If it's a new Law Firm, we usually - I'll usually choose to do an assessment first.

Q. Okay.

A. Because I don't even look at documents, or cases, without an assessment. So, in this case, I believe this was Mr. Steele's first order, and he made an assessment. We don't want anybody wasting money for something that isn't going to turn out to be useful. We don't want to waste our time.

So you have that assessment but, in reality, an assessment doesn't have any investigation done on it. It really shouldn't be in here.

Q. Okay. Well, why don't we go ahead and turn to - well, I guess it's the third page of the Exhibit, which is designated as Page 2. It's titled

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Executive Summary and Statement of the Expert.

A. Okay.

Q. Now, are we there?

A. Yes.

Q. You've indicated that this - you didn't really do a full investigation at this point, so I'm just going to ask you a couple of questions about your summary here in light of that fact.

You stated that "We believe that the original lender on the initial original mortgage was paid in full on this mortgage in the Freddie Mac securitization."

Having not done your full investigation, what are you basing that belief on?

A. Oh, that was easy to do. One of the first things we do is, we check Fannie Mae and Freddie Mac for claims of ownership. So that - and we take that, and we put that in to the case file.

So, in this case, where Freddie Mac is claiming ownership, then we know the loan has been securitized. That's what Freddie Mac was authorized by Congress to do.

Q. Okay. Now, can you explain what you mean when you say that the initial original mortgagee - I assume that meant to say - well, what do you mean

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when you say that the original lender on the initial original mortgage was paid in full?
A. You know, it's a surprise to a lot of people how Fannie Mae and Freddie Mac work. When you perform a loan prospector, or desk type underwriter type of inquiry to Freddie Mac, or Fannie Mae, and you get approval for a loan, that means that Freddie Mac, upon satisfaction, or Fannie Mae - it's the GSEs - will fund your loan in full, plus your profit. And that's the basis of the secondary market.
That was established initially in the 1900s to stimulate lending in America. Up until that point, banks had to lend their own money and sit with a loan as a liability. In this case, the GSEs buy the loan, and fund them in full, plus profit, to the lender so that the lender can go out and make more loans.
It has to do with the capital ratios of the banking industry inasmuch as lenders cannot just keep lending money unless they have a source of replacements for the money. So the loan is taken off the balance sheet of Homecomings, and Homecomings was paid in full.
They pretty much, you might say, brokered

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the loan - even though they may have had the label of lender, they weren't actually lending their money in the traditional sense of portfolio lending. So Freddie Mac, when they bought it at the origination - ResCap, in this case, just for your own information, would be acting, or could have been acting as a warehouse lender in the interim. But we don't know that.
We only know that Freddie Mac, Fannie Mae, when you originate a loan, those lenders get paid in full at the time of loan origination.
Q. Okay. So it's not your contention that the loan is paid off as to Mr. Renshaw; correct?
A. No. Mr. Renshaw - the loan was sold. Homecomings was paid off.
Q. Okay.
A. So Homecomings sold all - when they sell, they sell all beneficial rights, title and interest. So just in case the seller, like Homecomings, goes bankrupt, there's no claim on the buyer. That's why there's no beneficial interests that remain to any party on the original initial documents.
That would be an assign, or a subsequent holder - an owner and holder in due course.
Q. Okay. Why don't we go ahead and turn to

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Exhibit 9. This is a document identified as Forensic Lender Discovery, Stage One Loan Securitization Audit Report. Does Exhibit 9 appear to be a true and correct copy of that report?
A. Yes.
Q. Obviously, with the express caveat that you may have attached your Affidavit to this report, which is Deposition Exhibit 10.
A. Sounds good. Yes. That's my Affidavit of Experience and Truthfulness. I'm reading here about O. Max Gardner on Page 6 of my Affidavit, and I'm so sad about his liver cancer now.
Q. I'm sorry?
A. I guess I should say off - can I say something off the record?
MR. McGEE: Sure.
(Thereupon, a discussion was held off the record.)
BY MR. McGEE:
Q. Okay. So are we back on the record?
A. Yes.
Q. All right. Let's go ahead and turn to - it looks like Page 3 of your report. At the top, it says Executive Summary and Statement of the Expert.
Are you there?

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A. Could you give me the page again?
Q. It's designated Page 3 in your report. It's Plaintiff's 03019 at the bottom right corner.
A. Okay. I'm there - Page 3.
Q. Okay. I'm just going to - we're going to go through these nine numbers here, and I'm going to ask you a couple of questions about each.
It provides on Lines 1 and 2 that, based upon your personal investigation and the facts discovered, you'll be able to testify that Mr. Renshaw's loan has been securitized; is that accurate?
A. Yes. The Act of Freddie Mac claiming - yes.
Q. Okay. So the basis of your opinion that the loan has been securitized is because Freddie Mac is claiming ownership to the loan, or claimed ownership to the loan?
A. No. The basis of it being securitized is what Homecomings Financial did. They securitize their loans through ResCap. ResCap, if you look at their annual report filings, they are at the top of the food chain in securitizations. They securitize trillions of dollars of mortgages. And I probably specified it in this report.

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Q. Yeah. I think we'll get there. I just want to get a general idea about, you know, the basis of your opinion that the loan has been securitized. I kind of wanted to figure out from you if you have evidence specific to Mr. Renshaw's loan, or if it's basically in light of the parties involved with the loan.

Would you characterize your opinion as one based on the parties involved - i.e., Freddie Mac, Homecomings, ResCap - or would you base it on evidence you discovered related to the loan, itself?

A. I think I included the claim, in writing, of Freddie Mac to owning this loan. If not, I have that - oh, yeah. Here it is; it's in here. Yes, our records show that Freddie Mac is the owner of your mortgage. That means, by definition, that the loan has been securitized.

Q. Okay. That's all I was asking.

A. That is, to Mr. Renshaw's loan.

Q. Okay. So let's move on to Number 2. You state that you can testify that subsequent sales, or transfers of the loan, have not been revealed.

Can you tell me - well, first, what does that mean, exactly?

A. Well, you've provided the evidence in

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support of that. At the time, the documentation that I reviewed had only a Homecomings endorsement. Now you've come back with subsequent endorsements on the way to Freddie Mac, and now they purport to go further, or whatever.

But I knew that Homecomings - from the investigation, there's more to it than has been shown to us. And you have provided some subsequent evidence to support that claim.

Q. Okay. And is it your Expert opinion that the failure to reveal subsequent sales, or transfers, impacts the enforceability of Mr. Renshaw's loan at all?

A. I can't comment on the legal account of whether or not it impacts his loan, legally. But I expect, and I believe the Judges that I've had the privilege and honor of being before, expect truthfulness and voluntary disclosure in matters that come before them.

And so I make the statement that I didn't think that the full disclosure, at that time, had been made to me - and I was right.

Q. Okay. So let's move on to Number 3. You state that you can testify that Mr. Renshaw's Note and Deed of Trust, Sub A, have been paid in full.

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Can you tell me what you mean by that statement? Is that what you just stated about Homecomings having been paid in full, or has the loan been paid in full as to Mr. Renshaw, in your opinion?

A. Well, Homecomings was paid in full by Freddie Mac.

Q. Okay.

A. Freddie Mac was paid in full by the investors.

Q. Okay.

A. Who, at this point, are undisclosed. That's the way securitization works.

Q. Okay.

A. The Freddie Mac interest and principal, or whatever, that the taxpayer pays up, has been demonstrated by, I don't know, what is it - $400 billion, or a couple to a few hundred billion dollars being paid by the Treasury - Federal Reserve?

Q. Okay. So I guess my question - maybe to be more pointed - is, is it your opinion that Mr. Renshaw no longer has to pay off the Note as a result of what you've described?

A. No. That wasn't what I was stating here.

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Q. Okay.

A. Now, since you're asking me about that question, I will say that, if a Note has been paid off - I guess I could do it by an analogy, since you said that you were kind of green.

If you've paid off something to one party, and they show you copies of it and demand payment on it, do you have to pay it off again is the question - and, to answer that, I say it's already been paid off.

So Homecomings was paid off; Freddie Mac was paid off. We don't know the status - because Freddie Mac hasn't divulged, or disclosed, the Trust and the tranches, and the CUSIPs, and the investors, and the status of any cross-collateralized insurances or credit default swaps - whether or not the actual investor on this particular loan was paid off. That is still a missing quotient here.

Q. Okay.

A. If they have all been paid off according to the Note, I believe that it would enure to the borrower - any borrower's credit. In other words, if you had a loan, and I paid it off for any reason, does that still mean you owe money on the loan? And I would have to say that the answer is no.

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If I won the lottery, I paid my friend's mortgage off - my friend didn't pay it off; I paid it off - if your question is, does my friend still owe money on the loan, I think the technical answer to the Note, as a lender, would be no. That would satisfy that loan, and nobody would owe any more money on that particular loan.

Q. Sure. And, again, I just need to clarify this issue. It's not your opinion in this report that Mr. Renshaw is not obligated to pay his Note; correct?

A. I do not have the - nobody has submitted to me the evidence of which I just spoke in order for me to determine whether or not the final, or the investor, has been paid off on this loan. But Homecomings has; ResCap pass; and Freddie Mac has.

Q. Okay. So, again, your opinion is not that Mr. Renshaw is not obligated under the Note; correct?

A. Is that a double entendre - not, not?

Q. It's a double negative, I think, but --

A. Can you rephrase that?

Q. -- so maybe I'll rephrase.

What I'm understanding you to say is that you don't know whether Mr. Renshaw is obligated

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under the Note. You don't have any evidence to suggest that he still does not have to make monthly payments; correct?

A. I do know that the GSEs have received, what, some $250 billion to their investors to pay off bad defaulted loans. I don't know if Mr. Renshaw's loan has been included in that. I'd like to know. Nobody has discovered that, or provided me with that information.

But I am not excluding the possibility - I've told you who I know has been paid off, but if you're asking me, does Mr. Renshaw still owe money on the loan, at this point, I cannot say he does. I know that three of the interim parties have been paid off in full.

I don't know the status of the ultimate holder in due course, because you're not disclosing them, and you're not disclosing the details about it. And I could easily find that out if you did. So it's a possibility.

Q. So your answer is - your answer to my question was no, not at this time?

A. It's a possibility that Mr. Renshaw's loan has been paid off. Mr. Renshaw's loan has been paid off to Homecomings; Mr. Renshaw's loan has been paid

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off to ResCap; Mr. Renshaw's loan has been paid off to Freddie Mac by investors.

What I don't know is, have the investors, in the particular deal that they're in, been paid off by the quarter of a trillion dollars of taxpayer payoffs. I don't know that, so that's a possibility.

Q. Okay. So going back to the example you just gave, if you won the lottery and wanted to pay off my loan, and you made that payment - if you just paid the bank $250,000, that wouldn't necessarily get rid of my obligation.

What I hear you saying is that, if you specifically paid $250,000 for the account of Mr. McGee, that would resolve my debt. Is that what I hear you saying?

A. Well, in my example, if I had paid off your mortgage and satisfied it, that would satisfy the debt, yes. You would own a property - my intention was for you to own a property free and clear.

Q. And, in doing so, you would, in theory, designate the money for my account; correct?

A. Correct.

Q. But getting back to your Executive Summary here, that's not what you meant when you said has

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been paid in full. You weren't speaking conclusively that Mr. Renshaw does not owe any money on a Note. You were speaking as to the obligees - respective obligees - Homecomings, ResCap and Freddie Mac; correct?

A. I didn't know about ResCap at that time.

Q. Okay.

A. Homecomings has definitely been paid off on that Note, and so has every other lender. They don't have any beneficial rights at all. They sold them.

Q. Okay.

A. No party in that Note has any beneficial rights, unless they can prove it.

Q. Okay.

A. That would --

Q. So then Subpart B there states that Mr. Renshaw's Note and Deed of Trust have been separated and, in parens, you have bifurcated. Can you tell me, first, what that means, exactly?

A. Well, when you go in to - in the old days, when you go in to a foreclosure Court, the party would have, let's say, the Note in one hand and the Mortgage in the other.

Q. Okay.

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A. In this case, when you have a securitization by the manner that I spoke originally when I described to you the various areas of the securitized transaction, and on which I have given you a graph that I made, in the back of my report, I think - let me see.
Q. Uh-huh.
A. The - what happens is, the documentation is separated in securitization.
Here, if I refer to Page 22 of my Report, what's happening is the investors, they don't own Notes and Mortgages - kind of like the cows go in, and hamburger comes out. You can't put the hamburger back to be a cow.
Q. Sure.
A. It's the same thing with securitization. What happened was, whole loans went in, but now many investors own little tiny pieces of meat, and they can't put them back. And the reason - that's one of the byproducts of making hamburger, is that you can't make it back in to one whole cow.
So none of the investors, the parties who supposedly have laid out the money for this loan, can come in here with a Note in one hand and a Mortgage in the other. Just like you can't - you

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can come in with two plates of hamburger, but there are so many mortgages, and so many cows mixed in, you can't show just a Note and a Mortgage together.
Q. Okay. And this gets back, I think, to our discussion, maybe a little bit earlier, about the distinction between a holder of the Note and an investor, or an owner, of a particular interest in the Note.
And, again, I have to ask you, do you see a distinction there in light of what you just described to me?
A. What I'm describing to you about - what we're talking about is initial - I'd like to call it like this: Initial blue ink originals that, when transferred, get endorsements, or whatever, and there's only one of each - only one.
There could be a 100 copies of something, but there could only be one original. So the other ones are lithographs, and I'm just talking about the original artwork. And in terms of the original artwork, when Freddie Mac desires, or Fannie Mae desires for anybody, a servicer, or whatever - in fact, any Trustee desires for anybody - to get those singular, unique originals, you ask for them.
You fill out forms and submit them to the

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document custodian, which has got facilities that are something like - I'd like to call them Fort Knox style. They're vaults; they have high security, double signatures - all of the normal high security that you would expect any entity that was maintaining billions of dollars of bearer assets to have in place.
Q. Sure. So I guess getting back to my question - and I know you're not going to comment on legal conclusions, but it's my understanding that a Note, or any negotiable instrument, has to be properly negotiated.
So a Note cannot properly be negotiated to a bunch of individual investors separately. A single Note cannot be held by a bunch of investors at once. There has to be - it has to be held by a singular entity; is that correct?
A. Well, what happens is securitization - well, the answer to that is, correct. And that would be that the master document custodian holds that. But, in essence, in securitization, what has happened is, they've turned the mortgages in to something like a stock, or a bond.
They have - once - if you think of an IPO, and you have a company that has a bunch of equipment

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sitting in a warehouse - call each piece of equipment a mortgage in our case - but maybe it's - what do you call those things that raise things up and down in warehouses?
Q. A forklift?
A. So if you have these individual forklifts around, yes, you can say, at the time you're the owner of the company, you could say, yes, I own that particular forklift. But once the company becomes public and you're selling stock to it, it's now very difficult for one particular shareholder sitting somewhere in America to say, oh, now, I own that particular forklift. It's impossible.
Q. I guess that's my - that's kind of what I'm getting at is, in light of the fact that you can't negotiate a portion of a Promissory Note, because that's not proper negotiation of a negotiable instrument, the investors aren't actually holders of the Note entitled to enforce it. Is that your understanding?
A. Right. They're holders of certificates. They're called certificate holders.
Q. Right. They have an ownership interest in the Note, but they aren't actually the holders entitled to enforce it; correct?

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A. No. In your case, Freddie Mac is.
Q. Okay. So bifurcation enters the analysis when, what, when the Promissory Note, itself, is somehow split from the Deed of Trust, the security that attaches to the Promissory Note?
I'm trying to get a feel for how this bifurcation occurs, in your opinion.
A. Bifurcation occurs when loans go in and certificates come out. In other words, the investors are not able to produce evidence of ownership.
Q. Okay. So is it your contention that there's no longer a holder once certificates are issued?
A. There is a holder. It would be Freddie Mac. Freddy Mac purchased the loans, and owns and retains ownership to the loans as administrator and trustee. The problem is, those documents you showed me are not the ones that I think are Freddie Mac's.
But Freddie Mac would be that party. I don't see Freddie Mac's name anywhere in the legalities over here. I see MERS, but I don't see Freddie Mac.
Q. I mean, I understand what you're saying. I'm trying to figure out where the separation

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occurs, exactly. That's what I need to know - because it sounds to me, and correct me if I'm wrong, but what you're saying is that once that Note gets split up and they issue certificates to investors, the Deed of Trust is not - is somehow separated from the Note as result that action.
And I want you to explain for me, in your opinion, how that occurs.
A. How do you suppose that the mortgage, the Deed of Trust was recorded? Did they take the original mortgage and record it?
Q. I can't speak to that. I don't know. But probably not. I don't know, though. I assume it was kept in a collateral file with the Note.
A. Right.
Q. But that's all assumption on my part. I'm just trying to figure out, again, is it physical separation of the Note and the Deed of Trust that you're speaking about, or is it legal separation? Where does the bifurcation occur, exactly?
A. I think it's physical separation.
Q. Okay. So the contention that you're making here, in your expert opinion, the Promissory Note has been physically separated from the Deed of Trust; is that your opinion?

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A. Yes. The Promissory Note --
Q. The original blue ink Promissory Note has been physically separated from the original Deed of Trust?
A. Yes.
Q. Is that a fair characterization of your opinion?
A. Yes. I think the evidence to that is that the Note went down the path of some endorsements, and the mortgage did not. The mortgage just was represented by MERS in this case.
Q. Okay.
A. So the Note went down a path of endorsements that, you know, we look at. I contest you make bald claims, and the Mortgage Deed of Trust just rested somewhere, didn't go down that path, and MERS represents to have had that.
So you have a few transactions of something with only one transaction of something else.
Q. Okay. So - but based on my review of your report, you understand how MERS works in that MERS acts as a nominee, basically, for the Note holder. Is that a fair assessment of MERS' role in these cases?

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A. MERS serves as Mortgagee of record, and nominee for the participating members in the local land records.
Q. And, basically, is it your understanding that each of the people - when I say people - each of the entities involved in this case are MERS members?
A. Well, MERS takes action as mortgagee through documents that are executed by certifying officers of MERS. Is that your question?
Q. Sure.
A. And MERS designates those individuals who are officers or employees of members --
Q. Okay.
A. -- but sometimes third parties, who have contractual relationships with members, as officers of MERS.
Q. Okay.
A. And those officers execute legal documents in the name of MERS, such as the Substitution of Trustee, lien releases, mortgage assignments, and things like that.
Q. Okay.
A. I understand that MERS has about 5,000 or so participating members, of which about 3,000 or so

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are residential mortgage servicers, or were at some point.
Q. Okay.
A. And MERS is just a national electronic registry. All it does is track the beneficial ownership, and interest, and servicing rights.
Q. Okay.
A. That's what I understand.
Q. So, again, getting back to this bifurcation idea, I'm really trying to understand what you're saying.
Basically, the evidence suggests that, based on the endorsements, and based on all of the parties that have claimed some interest, whether it's servicing rights, or whether it's beneficial ownership interests, or whatever interests are claimed, this loan has been passed around.
And your contention is that the Deed of Trust, because MERS is always the beneficiary of record, did not follow that Promissory Note, physically?
A. Right. You know, MERS has had a lot of problems with oversight, and the lack of oversight by the supposedly certifying officers. And MERS was the subject of the Department of Treasury, the

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Controller, and the Governors of the Fed, the Federal Reserve System, and the FDIC, and the FHA and, when in business, the Office of Thrift Supervision, that they entered in to a consent order to change those processes. I don't think --
Q. And you know what? I'm sure we can refer to that specific document, as necessary - and I certainly will. But, right now, I think we'll stick with your opinion here.
So let's move on to Number 4. The statement here is that the Trustee documents are faulty.
Can you describe for me what you mean by that statement - because faulty is kind of a vague word, and I'm interested in what you mean by that statement.
A. We've gone over that, the Substitution of Trustee, in detail. I think that it's been asked and answered.
Q. Okay. So that Number 4 relates to the Appointment of Successor Trustee?
A. Exactly. I believe there's another Trustee action, in addition, but it definitely relates to the - when a Trustee - because in the Appointment of the Successor Trustee, a Successor

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Trustee was appointed.
By the way, I think that that's a problem, also, because Pioneer Title Company of Ada County was the original Trustee. Trustees are appointed on a Deed of Trust to be a neutral party and protect the lender and the borrower in the loan.
When you arbitrarily remove a Trustee, who is designed to protect the borrower and the lender, and you appoint a Trustee who is a default loan servicing foreclosure Trustee, solely interested in foreclosing at any cost, and only single agency responsible to the parties seeking to foreclose, it may be considered in a state, according to Attorneys - I just raise the issue - that the fiduciary responsibilities of their original Trustee have been compromised.
And I include those to which I speak in the itemized statement to which you are referring.
Q. Okay. So based on the document, it looks to me like Pioneer Title Company of Ada County was again appointed as Successor Trustee, and the only addition is that there's this care of Executive Trustee Services, LLC.
Is that what you are referring to when you --

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A. Well, yeah.
Q. -- when you talk about potential fiduciary obligations, is the incorporation of this additional entity Executive Trustee Services, that is acting as an Attorney in Fact?
A. Yes. Executive Trustee Services, and many of these services that are hooked in to the outsource-providing networks, like Fidelity, Lender Processing Services, that are under investigation actively by numerous Attorney Generals for fabricating documentation, for issuing documents that robo-signers - people that just sign their name and don't do anything else, there's been many Depositions by many parties - we in Florida created the first nuances of that to our own Attorney General, and it has halted foreclosures all across the Country and resulted in many cases where legal documents are presented to a Court as truthful documents when, in fact, they're fabricated.
I have the opinion, based upon the facts, that your documentation is included in that. Executive Trustee Services is one of those members. And if you look to the graph I made for you on Page 26 of my report, Exhibit 9, you'll see what I'm talking about.

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Q. Okay. But let me ask you: I understand what you're talking about, but Pioneer Title is still named as the Trustee; is that correct? They're still the Trustee of the Deed of Trust.
A. No. They've been removed. Your Donna Fitton has removed them, according to her.
Q. Well, let's look at Exhibit 6 real quick, just to clarify that.
A. I'm looking at it.
Q. That's not how I read it. Do you have Exhibit 6 in front of you?
A. Yes. Yes, I do.
Q. Okay. So the paragraph that begins, "Now therefore," it reads, "Now, therefore, in view of the premises the unsigned hereby appoints Pioneer Title Company of Ada County, d/b/a Pioneer Lender Trustee Services, care of Executive Trustee Services, LLC, at 2255 North Ontario Street, Suite 400, Burbank, California, as Successor Trustee under said Deed of Trust, to have all the powers of said original Trustee, effective forthwith."
This appears, to me - and please give me your opinion - but it appears to me that Pioneer Title Company of Ada County remains the Trustee of this Deed of Trust.

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A. Executive Trustee Services is the party here taking the actions. Is there any question about that?
Q. Well, and I guess we should clarify what actions you're talking about. What actions are we talking about?
A. Any actions. They're a default loan servicer. Any actions to foreclose are being taken by Executive Trustee Services.
Q. Okay. So you are aware that the Trustee sale did not occur in this case; correct?
A. I do not - are you making me aware of that now?
Q. To the extent you're not aware, yeah. I will represent that Mr. Renshaw's property was not the subject of a Trustee sale foreclosure.
A. But have they not been issued a Notice of Default?
Q. They did issue a Notice of Default. Executive Trustee Services, as Attorney in Fact for Pioneer Title, issued a Notice of Default.
A. Is it your contention that the only responsible action of a Trustee is the actual event of Trustee Deed, or foreclosure sale?
Q. Well, I'm not making any contentions. I'm

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trying figure out what your contentions and what your opinions are.
A. My opinion is that, once a Default Trustee is designated, there's a series of Trustee actions in the process, and on the pathway to foreclosure. And I believe that it's Executive Trustee Services who is taking those actions.
Q. Okay. Now, are you familiar with the Idaho Trust Deed Act? It's a nonjudicial foreclosure act here in Idaho - it's what all these foreclosures occur under.
A. I don't know the laws in Idaho.
Q. Okay.
A. And I don't comment on the laws, if I knew them, anyway.
Q. Okay. So you don't comment on the laws --
A. Well, I try not to. It's not within my - the problem is that an Expert witness in an area, just like an Attorney, cannot offer substantive testimony as an Expert. I can't be an Expert, and then go and sit behind the table and be a Lawyer.
Q. Sure.
A. Right.
Q. But your opinion, returning to Exhibit 9 and your Executive Summary here, it says "The

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Trustee documents are faulty." And then you describe the reason as being the fact that Executive Trustee Services was named as an Attorney in Fact for an actual Trustee in this Appointment of Successor Trustee.
Now, the reason the document is - it sounds to me, and correct me if I'm wrong, but it sounds to me that you're suggesting that the faultiness associated with this Default Trustee, ETS, Executive Trustee Services, is a result of their taking any action to foreclose the property at all.
Is that a fair assessment?
MR. STEELE: Could I interject something, Mr. McGee? In that question, I believe you added an additional fact that I'm not completely certain --
THE WITNESS: Yes, that Attorney in Fact?
MR. STEELE: The Attorney in Fact, yes.
THE WITNESS: I was going to ask about that.
MR. STEELE: The Attorney in Fact comment, yes.
Could you please explain to Mr. Kahn the Attorney in Fact reference that you made?
BY MR. McGEE:

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Q. Well, you're right. And, unfortunately, I did not send that over to mark as an Exhibit but, Mr. Kahn, I'll just represent to you that Pioneer Title Company executed and recorded a document titled Limited Power of Attorney, in which it granted Executive Trustee Services the right to mail and serve certain documents, including Notices of Default and Notices of Sale.

And so, to the extent that that explains my comment about Attorney in Fact, that's what I was referring to. If we want to go ahead and - why don't we get out Exhibit 11 and put that in front of you, and I will provide an example of what I'm talking about.

Exhibit 11 is the Notice of Default. And let me know when you have that in front of you.

A. I'm looking it over.

Q. Okay. So the second page there --

A. Oh, yeah. I see it. Well, so you're saying there's an Attorney in Fact. There could be an Attorney in Fact, or whatever it is, but MERS has appointed a Trustee based upon Homecomings' alleged direction to do it in a Substitute Trustee document which MERS cannot - does not have the authority to do, in my opinion.

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You know, I can't refer to law but, in forensics, we look at some settled cases to find little items that we should investigate. And I'm pretty sure Mr. Steele can provide you with case law to evidence that, to do that act, for the lender, Homecomings, on 8/2010, when you already said that GMAC, even though I dispute what your bald claim is, that GMAC did not acquire the loan Note in order to enable their employee, Donna Fitton, to take those actions until just a couple or few months ago in 2012 - that that action of appointment is toxic. It's defective. There are discrepancies.

Homecomings had sold the loan. They're not mentioning the name of the party that it sold from. The actions that it is taking is against MERS Rules. The proper action, according to MERS Rules, would have been to assign. That's what it had the right to do.

And you could go to the rules. I have them. It's not the rules you provided, but it's in MERS website.

Q. And just so we're clear on that, just so - because MERS Rules have kind of become an issue in this case, despite the fact that they're really not pertinent to violations of Idaho Law. They have

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become an issue, and I provided, as Exhibit 5 - and I think we maybe should get that out and take a look at it.

These are the MERS Rules that were in effect at the time Mr. Renshaw's foreclosure was initiated. So I guess - I understand what the MERS Rules currently provide, and I don't even need to discuss that with you. I think what's critical for this case, to the extent that you're going to rely on compliance, or noncompliance with MERS Rules, do you agree that we should probably be looking at the rules that were in effect when his foreclosure was initiated?

A. I think that if you want to look at that, then what MERS says here, that I've got from that time period, is that the problem is - and the reason why MERS has lost cases in various cases that they cite in their writing, is that the proper assignments of the mortgage to the Plaintiffs had not been prepared prior to the commencement of a foreclosure action, and MERS couldn't satisfy the fact that MERS was a holder of the Note.

In here, as I said before, the blank GMAC endorsement purports to empower the Donna Fitton signature of MERS to take lender action without -

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that isn't provided by Homecomings because Homecomings was no longer the owner, and no longer a beneficial party.

So the party would have had to have been the employer of the MERS executive - in this case, GMAC's Donna Fitton.

Q. Okay. So GMAC Mortgage, as a successor or assign of Homecomings; correct?

A. No. GMAC Mortgage has not been established as a successor or assign to the Mortgage. Freddie Mac bought this loan. You said that something happened - you're alleging that GMAC did some buying afterwards, which is not evidenced, and would be conjecture and hearsay for me.

So I think that this action, this one here, at that time, is misrepresenting MERS' authority.

Q. Okay. So notwithstanding these - the recent purchase of the loan, if the Note was endorsed in blank, and GMAC Mortgage, as servicer, held the Note, then would a signing officer not have the authority to take action as a beneficiary?

A. Could you restate that, because sometimes the double use of negatives confuses me.

MR. McGEE: Sure. Maybe we'll just have

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Ms. Fitzpatrick read the question back. Can you read that back?
(Thereupon, a portion of the record was read by the Court Reporter.)
THE WITNESS: If - let me see if I understand the question. Are you asking me that, if a loan servicer has a Note properly, without question to the chain of title - that it's not in dispute - that the loan servicer, or their designated employee, could take actions as the owner and holder of the Note - is that your question?
BY MR. McGEE:
Q. Not as the owner; as the holder of the Note?
A. If it's duly authorized by the owner, it could take action.
Q. But isn't a blank endorsed Promissory Note sufficient authority?
A. The original owner's Note, or a copy?
Q. The original.
A. If a party holds the original note in terms of conveyance, the mortgage always follows the Note. You don't need anything else. If you've got that note signed, properly endorsed, and everything is legit, I pretty much think you could do whatever

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you want.
Q. Okay. Let's move on to --
A. But that's --
Q. -- or back to Exhibit 9, your Executive Summary.
Do we need to take a break, or anything?
A. No. I'd like to add, but that's not the case that I found in this particular case. You're asking me hypothetically.
Q. Right. I am asking you a hypothetical.
A. Okay. Because I've already stated my opinions in this case that there's significant --
Q. That the documents are faulty?
A. -- significant issues.
Q. Sure.
A. Okay.
Q. Let's move on to, or again move back to Exhibit 9 and your Executive Summary here.
And we've probably already gone over this at length, but just to make sure I have an understanding of what you will testify to, you state that you will testify that the chain of ownership is faulty.
Is that a result of your analysis of a faulty endorsement, or is there something else that

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I should be aware of there?
A. No. I think I've pretty much expressed the various things that I will testify to in the lengthy Depo. The chain of ownership --
Q. So just so I'm clear, your opinion is that the endorsement and allonges to the Promissory Note are faulty?
A. Yes.
Q. Is there anything else related to the chain of ownership that you're contending is faulty, or is evidence of a faulty chain of ownership?
A. You know, as with any study, there's an ongoing process, additional facts like the ones you raised - they can be developed. I don't think we're going to get any scientific knowledge that's going to be discovered, but additional facts, as they occur can, in my case, I think support my opinions. But, really, any analysis in this business is always ongoing.
So if you're looking to have me give you a commitment that the analysis of the case is complete, it's not appropriate because additional information may have yet to be developed through discovery, or other sources like you have provided on a couple of occasions.

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Q. Fair enough. I guess I should narrow the question, then, and suggest that today, in light of your current knowledge of the case, is the problem associated with the Note your primary evidence suggesting that the chain of ownership is faulty?
A. As I've testified, yes.
Q. Okay. So Number 6, you state that you'll be able to testify that robo-signing has taken place. I think you may have defined robo-signing here, but why don't you give me your definition of what robo-signing means, first.
A. Hold on one moment. I actually like to go to the definition of the Attorney Generals.
Q. Okay.
A. Because I like to - I admire the Attorney Generals, and I like the things that they do.
Q. Is this something that's in your report here, or are you looking somewhere else?
A. No. Let me see. I may have mentioned - I'm looking through here, and I don't see that I mentioned it.
MR. STEELE: I believe it's the Joint Statement of the Mortgage Foreclosure Multistate Group, which is attached to Mr. Kahn's report. And it's - at the bottom, it's identified as

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Plaintiff's 03049.
MR. McGEE: Okay.
MR. STEELE: And it's about Page 34 or 35 of your report, Mr. Kahn.
THE WITNESS: I guess that would be it, then.
What page is it?
MR. STEELE: Look at Page 34.
THE WITNESS: Oh, PLF-34?
MR. STEELE: In the bottom right-hand corner, it will say 03049.
THE WITNESS: Oh. I've got it. Yes. Yes.
Thank you.
In the first paragraph, you can see that it says "robo-signing includes signing something without personal knowledge of the facts."
BY MR. McGEE:
Q. Okay.
A. "Or confirming their accuracy."
Q. Okay.
A. But it also includes varying signatures, false claims of corporate executive positions of different companies to suit a foreclosure mill action - you know, I work for this one. I like to

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say it's the repo-man example.
You know, repo-man sees that something is available, calls on the employees to get in to their white shirts, put little hats on, names them differently, sign these documents, swear to it - they do it; and if they don't do it, they say, do you want to find another job somewhere else - so they do it, and then they get back in to their mechanics clothes, so to speak.
Q. Okay. So you're going to testify that robo-signing is taking place in this case. Can you describe what evidence you have of that robo-signing?
A. Well, Donna Fitton, besides the fact that Sally Beltran has had issues on her own as the Notary, I believe that the - if you would - I don't know if anybody has deposed Donna Fitton.
MR. STEELE: No, that hasn't happened.
THE WITNESS: Donna Fitton, in my opinion, would be a very good party to depose. But I can see from the documentation of the statements, in themselves, that she has not written in here that the loan was sold from Homecomings. She's not citing that.
BY MR. McGEE:

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Q. Okay. So I think we're on a different issue. I'm just asking for evidence of robo-signing. You're talking about the faultiness of the documentation. I'm talking about, specifically, evidence that somebody signed something without personal knowledge, or without confirming the accuracy of the statement.
So that's the evidence that I'm looking for you to identify for me right now.
A. That's what robo-signing is. If you look at the National Association of Attorney Generals, in their historic mortgage settlement in to robo-signing, that's what it is.
What they want to do is, they want to ensure that a party isn't just signing 100, 200, 300 of these a day, but that they're actually looking at the documents, and they're actually doing the research to say, now, Holy Mackerel - oh, yeah, the proper owner is this one; here I'm taking actions on behalf of a party I should have authority; it should be real - and not just having a stack of 400 pages that they have to go through each day. That's part of the problem.
In this particular case, that is evidenced by the fact that the body of the document does not

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reflect the transactions that have been recorded to occur.
Q. Okay. So we've got Donna Fitton's signature on - I assume you're talking about the Appointment of Successor Trustee; is that correct?
A. That's the one I am, yes.
Q. Okay. Anything else?
A. Nope. I think she's signing something she has no idea - you know, she's not - whatever it is, by coincidence, or mistake, or intentional, the Appointment of Successor Trustee is citing a company that she could not possibly receive instructions from.
Q. Now, I just want to be absolutely clear. We were talking about the Appointment of Successor Trustee. Do you see evidence of robo-signing in any of the other loan documents at issue in this case?
A. I am only in possession of two documents . The one for Donna Fitton, which is the Substitution of Trustee --
Q. Okay.
A. -- and the other one, which is a Notice of Default claimed to --
Q. So those are the documents that we've made Exhibits today.

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A. Those are the only two I have.
Q. Is the Deed of Trust an Exhibit?
A. There's no robo-signing in the - to my knowledge, I did not recognize any robo-signing in the Deed of Trust.
Q. So when Mr. Renshaw signed the Deed of Trust, there's no evidence that he was unaware of what he was signing?
A. I could not conjecture to Mr. Renshaw's state of mind. I personally can't figure out how a paraplegic could sign anything, but I'm not a medical expert.
Q. So the answer is, no, you have no evidence --
A. My answer would be that --
Q. -- that there was robo-signing by Mr. Renshaw?
MR. STEELE: Well, that's not the issue, whether Mr. Renshaw robo-signed. It's not an issue, and no one has made that contention that Mr. Renshaw robo-signed anything.
MR. McGEE: Well, I'm trying to be clear here,
Jon. I need to understand --
MR. STEELE: Yeah. We're talking about

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your client robo-signing; we're not talking about mine.
THE WITNESS: Exactly.
MR. McGEE: You understand the issue here, Jon. The contention is that my client executed some document without knowing what was in it, and so do I not have a right to ask Mr. Kahn whether he has any evidence that Renshaw didn't know what was in the document he executed?
MR. STEELE: Well, you can ask him if he knows, and he can answer.
BY MR. McGEE:
Q. So the answer is, no, Mr. Renshaw - that you don't have any evidence that Mr. Renshaw did not know what he was signing when he executed the Deed of Trust; is that correct?
A. I did not attempt to evaluate, nor did I recognize, or investigate, any robo-signing issues with Mr. Renshaw.
Q. Okay.
A. I only did it in the manner of which the settlement, the Attorney Generals' mortgage settlement, which includes your client, Ally/GMAC, or related party, and in that definition provided to the world, it is thought to be in the process of

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bringing wrongful foreclosure by parties seeking to foreclose without rights or authority, and manufacturing and fabricating documents to appear legitimate in a Court when, in fact, they have been contrived to facilitate a foreclosure when they don't have the rightful legitimate documentation.
Q. Okay. So let's go to - we've talked about Deposition Exhibit 11. Do you see any robo-signing - any evidence of robo-signing on this document?
Exhibit 11 is the Notice of Default and Election to Sell Under Deed of Trust.
A. I do not know at this point whether or not Carlo Magno has examined the Attorney in Fact documents. So I leave it open to robo-signing, unless you have the attorney - Power of Attorney document.
Q. Well, I will represent that it's a matter of public record. It has been recorded in the County land records.
MR. STEELE: You don't have an idea of whether Mr. Magno's ever seen it or not; is that correct?
THE WITNESS: That's what I said. And we have --
BY MR. McGEE:

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Q. So let me be clear. Your answer is, no, you do not have any evidence that Mr. Magno robo-signed this document?
A. No. My answer is that I cannot conjecture as to whether or not Mr. Magno has reviewed the Attorney in Fact or Power of Attorney documents. As opposed to the prior question with Donna Fitton - I can obviously see from the body of the document that it's incorrect. The only thing I see here is that a statement is being made that Carlo Magno is an authorized signatory.
You're telling me that the Power of Attorney has authorized him, Carlo Magno, to take actions on behalf of these other parties. But from my view, it's hearsay and a bald claim.
Should you wish to have me be more detailed on it, I welcome the submission of the documentation and the Affidavit by Mr. Carlo Magno that he did do that, and all the other appropriate documents, and then I'll be happy to answer differently. I reserve my rights.
Q. I mean, that's not really what the question was. The question is, do you have - okay. I'll rephrase it.
Do you have an opinion today, based on the

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evidence you have reviewed in preparation for this Deposition, and in the preparation of your report, as to whether there is any evidence of robo-signing in this Notice of Default and Election to Sell Under Deed of Trust?

A. May I take a moment? Let me turn my light, get the heat going, and let me read this for a second.

Yes. I believe Mr. Carlo Magno - Page 2 is attesting to what is written in Page 1; no? Page 2 here is attached to Page 1.

It's the same mistake over here. He's talking about Homecomings; he is not mentioning anything else. He hasn't researched it. It's wrong; it's incorrect.

Q. Well --

A. That's robo-signing.

Q. -- you've got to be clear with me here.

A. That's robo-signing.

Q. Hold on a second, because the reference to Homecomings, as I see it, is actually a reference to - it identifies the Deed of Trust. Is that your answer? I mean, is that --

A. Well, let's see here. It says that MERS, solely as nominee for Homecomings, is taking

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actions.

Q. Well - and - let's run through this real quickly because that's not how I read it. I read the reference to Homecomings as identifying the Deed of Trust - the actual document, itself.

Do you disagree with that?

A. It's identifying the document, itself.

Q. I'm sorry. What did you say?

A. It is identifying the document, but it's saying that there's a breach of the obligation to Homecomings. And I've already testified on numerous different occasions that the Note to Homecomings was paid in full. Homecomings --

Q. Where does it say that there's a breach as to Homecomings?

A. "The Trustee hereby gives notice that a breach of the obligation for which such transfer is security has occurred under the Deed of Trust."

I'm - here's how - maybe this will satisfy your questions. In a case such as this, where so much what I consider to be fabrication has occurred that I've discovered, I have to be suspicious of similar, like this one other piece of documentation, that if you're asking why, in the face of so much what I consider to be misrepresentation, defects and

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deficiencies, would this one particular signer not be suspect to all of the other things that I've exposed here and found here?

And so if you're trying to elicit a statement from me that, lo and behold, this one party is not on the same path as the other things that I've shown, I'd need to see evidence of that.

In the absence of the evidence - and, normally, it would be in the form of an Affidavit or Deposition, and it would include Carlo Magno stating that he has done certain things, and the documentation of which it's referencing, and I shouldn't have to conjecture based upon a lack of full evidence by which I could make an educated, professional opinion, and you're keeping --

Q. Well, you've got to understand, that's what you've been retained to do.

A. Yes. But --

Q. That's - you're an Expert in this case. So I'm asking you to look at this document, and tell me what evidence you see of robo-signing. It's really that simple.

I understand that you think the whole thing was fraudulently done. But I need - I can't deal with totality of the circumstances here. I

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need actual specific statements from you as to the particular documents you think are fraudulent, or robo-signed, or whatever.

That's what we're here for.

MR. STEELE: Just a second here. I think this would be a very good place for us to take a little break because, Mr. McGee, you're arguing with Mr. Kahn. And so I think we ought to take about a five-minute break --

MR. McGEE: I think I need --

MR. STEELE: -- and then, if you have a question, you can ask him that question.

MR. McGEE: -- the pending question --

MR. STEELE: No. You didn't pend a question.

You are arguing. So let's take about a five-minute break, and then we can start up again. We'll go off the record.

(Thereupon, a discussion was held off the record.)

MR. McGEE: Are we ready to go?

MR. STEELE: Are you ready to go, Mr. Kahn?

THE WITNESS: I am. You know, I'd like to say that I don't consider it to be an argument. I

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feel that we're all calm and unemotional, and that nobody is acting outrageously. And, you know, I don't feel any exasperation, or boredom, or fatigue, and I'm not afraid to admit anything.

I don't know the answer --

BY MR. McGEE:

Q. Well, hold on. Okay. Are we on the record now?

THE COURT REPORTER: We are.

BY MR. McGEE:

Q. Oh, okay. I apologize. I didn't know whether we made it back on the record. Okay. Go ahead.

A. And I want to reserve the right to - I'm suspicious of Carlo Magno because of all of the other things I've seen here. And I can say that I have not completed my analysis of Carlo Magno's potential to robo-signing, but I'm suspicious that the same Sally Beltran's signature on the same date, on the same parties - that if Donna Fitton is evidenced as quoting it in a certain way, that I'd like to reserve my right to further analysis of the Carlo Magno signature.

If you have an Affidavit, if you have a copy of the Power of Attorney - I can't access it.

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Those things like that - and perhaps that will satisfy you.

Q. Well, what I'm asking you today, and this is just as of today, other than - it appears now that you've identified the fact that the same Notary was involved in both Notice of Default and the appointment of Successor Trustee.

Other than that fact, can you identify for me any evidence in this document of robo-signing?

A. The parties at the top of the recording, LSI Title - do you see that?

Q. Yes.

A. They are under multiple Attorney Generals investigation for massive robo-signing - massive - all across the Country. They have already been documented to have signers, and they've been deposed, delivered - it's very well-known. Just give them documents by the stack, and have them sign. They don't even sign their name in the Notary area.

And I've reviewed Depos and things of parties who have testified that they just look to see if it's their name and they sign it. And the agency, LSI Title, who filed these two documents at the simultaneous time, on the simultaneous date,

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with the same parties, is just so blatantly, up front, number one in America of doing that.

I will - if you give me a second, I will quote you exactly what these open investigations and things are.

Q. You know what? You can certainly do that in a second, but I want to make sure we're clear about the role of LSI Title Agency, and what their robo-signing issues are. In this particular case, it looks like LSI Title Agency, Inc., requested that this document be recorded.

A. Yeah.

Q. It does not appear, looking at the document, that LSI was involved in executing or notarizing this document. Is that your understanding?

A. No. LSI - everybody knows what FIS, LPS, LSI, FNF, Fidelity does. They make all of the documents, ship them off, have them signed, have them returned. And they're behind it. That's why they're doing it.

They're drawing the documents; they're making them; they're putting the parties in there; they're filling everything out; they're sending them over - that's what the network does.

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It's well-established, and it just is what it is.

Q. Okay. So --

A. So the likelihood that this document is robo-signed is just so extraordinarily high that I would have to say that, based upon the parties, the content, the company behind it, I'd say it was robo-signed without evidence to the contrary.

Q. Okay.

A. And I'll make my testimony providing conclusory proof of LSI, their tie in to LPS, their tie in to FIS, the Depositions of many of their employees, to the fact that they're signing - because it's been notorious across the Country.

Q. I understand what you're saying but, again, I mean, you indicated - I believe you even, at the outset of this Deposition - that hearsay is not something you rely upon.

And a lot of that sounds like hearsay to me.

THE WITNESS: No.

MR. STEELE: Well, Mr. Kahn did ask for a second so he could review a document. Why don't you go ahead and take a couple of seconds to pull up the document you referred to, Mr. Kahn.

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BY MR. McGEE:
Q. At this stage, I think LSI - I think we need to clarify this LSI issue because, again, is it your understanding that Carlo Magno was an employee of LSI?
A. No. LSI is owned by Lender Processing Services. LPS, which is Lender Processing Services, is under the name of Fidelity National. And they changed their name to FIS, and LSI.
So they do business as LPS Default Solutions; they did do business, also, as Doc X; they're currently under investigation by Florida, but they're also under investigation by California, Michigan, Illinois, Washington and other State Attorney Generals for employing dozens of workers that produce thousands of fraudulent assignments - producing them every working day.
Q. So what I need to do is understand the relationship of LSI, because it's my understanding that we're looking at the person who is attesting to the facts included in this Notice of Default, which is Carlo Magno; right?
And Sally Beltran is attesting to his appearance before her for that signature. Now, what I'm asking is, do you have any evidence that Carlo

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Magno has any relationship to LSI?
A. He's been provided the documents to sign that appear to have been drawn and requested by LSI.
Q. So you read this little notation up here as suggesting that LSI prepared this Notice of Default?
A. You said that you were green, and so are you aware of the National issue of LSI, LPS, FNF - are you aware --
Q. I'm aware, but here's the issue that I have, Mr. Kahn - is you're drawing a lot of conclusions about LSI's role here, and I want to know what you're basing those conclusions on.
It looks to me like this document was recorded at the request of LSI Title Agency, Inc. And you've gone over and above that, and drawn the conclusion that they drew up the documents and requested that Carlo Magno sign it, if I understand what you're saying.
MR. STEELE: Well, just a second, here. You asked Mr. Kahn if he was aware of the issues of LSI, and he said yes; are you - and you said you were also - Mr. McGee, you said you were also aware of the issues.
MR. McGEE: I'm aware of the robo-signing

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controversy - yes, Mr. Steele, if that clarifies what we're talking about here. I saw the 60-Minute program, et cetera, et cetera.
Here is what I'm asking --
THE WITNESS: Can I ask you a question, Mr. McGee? Are you aware - have you looked at the open investigations of the Attorney Generals?
BY MR. McGEE:
Q. I have no awareness, and I am not going to answer questions about my awareness of anything. That's simply not appropriate for this Deposition. What I'm asking you is --
A. I apologize for that. Let me just say, the Attorney Generals have reported that these subject corporations that I'm speaking about have created and manufactured bogus Assignments of Mortgage in order that foreclosures can go through more quickly and efficiently - that the documents have appeared to be forged, incorrectly and illegally executed, false and misleading, and they've been used in Court cases as real documents and presented to the Court as so when, actually, it turns out that they're fabricated in order to meet the demands of the institution that does not, in fact, have the necessary documentation to foreclose

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according to law.
When I look at the other stuff that's involved here, and now I see this, that and the other, it all kind of fits in to the puzzle. So what are you asking me? Let's see if we can --
Q. What I'm asking you is, in this particular case, other than this controversy that you're referring to which, at this point, has nothing to do with this case --
A. I think it does.
Q. -- this particular document --
A. I think it does. I think these things that you're showing me about those bogus, fraudulent endorsements, and ResCap things, the party that makes those things are the ones we're talking about. They make them; you can order them.
In fact, you can go out and choose - like, la carte, like a Chinese restaurant, and order them.
So I think it all ties in. I think it's all part of the misrepresentation that's going on in this case.
Q. So is it your opinion that LSI Title Agency, Inc., actually prepared this document?
A. I don't know if they actually prepared the document, but their name is on it, and they're

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involved.
If you'd like to draw them in, and Mr. Steele would like to depose them and, as I said before, the analysis is ongoing to disprove what I think is - from my years and decades of experience - is happening here, you may do so.
But that's my opinion, and I'm sticking to it.
Q. Okay. So to be clear, your Expert opinion is that that document --
A. I'll state it for you.
Q. Okay.
A. Absent any proof to the contrary, I feel that the bald claim of Carlo Magno, having examined the ownership, which is not stated in its totality in the Notice of Default, and the claim to be acting as an Attorney in Fact, is a bald claim. I don't think that - and as is an authorized signatory of the Attorney in Fact. I see no evidence in support of it.
I also see errors in the documents, parties involved, and that have been inappropriately substituted and acting in a manner that I find to be robo-signing. If you wish to produce evidence to change my mind, that's perfect, and I'll be happy to

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look at it and reverse opinion.
But here you have LSI Title involved; you have Trustee Services, who are not the Trustee that is to consider the borrower's circumstances.
I think that it starts out with MERS misrepresenting the issues assigning it over to somebody else, and you're just not submitting to me documentation that an Expert could pass judgment on. If you were, it would include Affidavits, it would include perhaps a Deposition transcript, it would include the documents upon which they claim to have rights, title and interest to.
Now, to your question about LSI Title and the network of which I gave you a distinct and appropriate graph in my report, they perform the services - the mortgage package services - that you may find hard to believe, that they make it easy for these parties to perform foreclosure actions at very low fees and costs. And it's a package. They label it as such, and they're famous for it. They do it very well.
If you're going to say that, once we know that they're involved in the background, that they don't do what everybody else knows that they do, well, I can't change that. But we all, in the

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industry, know it.
Q. Let's turn back to your Executive Summary here.
MR. STEELE: Which Exhibit is that again, please?
BY MR. McGEE:
Q. Exhibit 9, and it's Page 3 of the report. Number 7 there provides that you will testify that the documentation has been reverse-engineered.
First, can you describe what you mean by that statement?
A. Reverse-engineered, in the business, in the industry, it's known to be when actions are taken based upon fabricated claims and documentation which appear to have been done in a timely fashion to authorize entitlement and rights and authority when, in fact, it's done after the fact.
For example, claiming to have rights and title and possession of a Note endorsed in bearer long before that actually occurred - that is reverse engineering.
Q. And then, following that up by making the appropriate endorsements, or what have you, to ensure that the property is - proper authority subsequently happened? Is that kind of the reverse

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engineering process?
A. No. Reverse engineering, it would be - for example, in a case where Mortgage Electronic Registration System's Assistant Secretary claims on August 10th, 2010, to be taking actions to substitute a Trustee, which would be - which, by MERS Rules, is required to be done by a party holding a bearer Note in its possession, holder, and actually not having that bearer Note in their possession until a later, different date, and then relying on the later, different date endorsement, for example, to support and authenticate the actions taken when, in fact, they were not in possession, and that was not the status of the time - as has occurred in this case.
Q. So as a practical matter, why does that matter?
A. Well, I don't know the legal law rules that say that you can only sell what you own, or create a legal commitment on something. In the world of mortgage backed securities, we may have forward mortgage commitments, or forward commitments, or things like that.
But when I sign that I own something on this day, and I had that on that day when, in fact,

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I didn't, I personally understand that to be misrepresentation and fraud if I represent in a Court of Law that that, indeed, was what I had when, the truth of the matter is, I didn't.

So I view that to be - I would never do that in a Court of Law. I don't know if you would, but when somebody does it, I think that it's untruthful - not truthful.

Q. Okay.

A. Reverse engineering has been well-established by the Attorney Generals, and there's a widespread national investigation at this time, just like --

Q. Again, I think I understand what you're saying, but for a defaulted borrower in a nonjudicial foreclosure, why would it matter - you know, if your opinion is true that authority did not actually exist until a later time, how would that impact the borrower in this case, Mr. Renshaw?

A. You know, it's not for me to conjecture. The Attorney Generals had settled the historic mortgage settlement on February 9th. Your State Attorney General in Idaho signed off on it.

And, therein, they specify - and I provide a link on my website, and you're welcome to go to it

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- what is considered to be under the settlement. And robo-signing is prohibited.

So whether or not you think it may matter, or I think it may matter, it's been settled that it's prohibited, and it matters.

Q. And, again, we're not talking about robo-signing. We're talking about reverse engineering, or after acquired property here.

A. Reverse engineering is a component of robo-signing. It's very, very integral to the robo-signing definition.

Q. Okay. Are you familiar with the concept of after acquired property?

A. In a legal concept?

Q. Yeah.

A. No.

Q. Okay. Number 8 in here says that you can testify that Federal loan modification requirements have not been met. Can you explain the basis of that opinion?

A. I see no evidence of any HAMP Waterfall documentation, no attempt to contact Renshaw about his rights to explore the alternatives to foreclosure, or his rights to request mediation, no computation - these things are required under the

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mortgage settlement.

Take a look at that mortgage settlement and see what GMAC is required to do. They're a sub-servicer of this account. Those programs, the hierarchal programs on the Waterfall basis to avoid foreclosure have not, to my knowledge, been done. The programs are readily accessible.

You say that GMAC bought it, or bought the loan, which is news to me today, but I don't see that it has been done.

Q. Okay. So - and this may be a good opportunity to ask you a question that I should have asked you earlier. What materials, other than the materials cited in your report here - specifically, the loan documentation and, perhaps the Complaint, itself - what materials did Mr. Steele provide you for your investigation?

A. Well, if you turn to Page 4, it begins a list of the timeline.

Q. Uh-huh.

A. So I received a good faith estimate, that Note which is signed by Dorothy Okech --

Q. Uh-huh.

A. -- of which I note a conversation with her but, of course, that's hearsay.

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But I provide the contact information for Ms. Okech in case anybody wants to depose her. The Deed of Trust, the loan application from Colonial First Lending --

Q. Okay. So other than these items here, have you been provided any other information by Mr. Steele?

A. Let me see something here. I have.

Q. And what is that?

A. I've been provided various documents - for example, your Exhibits.

Q. Okay.

A. And some other items for my consideration in the case, which are in the file, with Mr. Steele's directions to please review them - I'm paraphrasing it so that it helps you to discern the truth, so you can tell the truth.

Q. Sure. Have you had the opportunity to review the loan file that Homecomings and GMAC Mortgage produced to Mr. Renshaw in this matter?

A. Can I check the --

Q. Yeah. It's a large document. I assume it would be 600 or 700 pages.

A. Oh, no. Let me just check, please, because this is a big case file. I'm trying find -

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oh, here it is. Renshaw, Gregory. Let's see. I have information for the Depo.
Would it have been in the initial documentation?
Q. I'm just trying to get an idea of whether you've been privy to the written discovery that has occurred since the initiation of the lawsuit, or if the bulk of your investigation occurred prior to the initiation of the lawsuit.
A. The bulk of my investigation occurred prior to January 4th, 2011.
Q. Okay. So you don't actually have any evidence as to whether Mr. Renshaw applied for a HAMP loan modification?
A. I do not have - as I stated in my report, I don't have any evidence of that. If that has been done since - is that what you're saying?
Q. No. I mean, that's not what I'm saying. What I'm asking is whether, even in your investigation in to this matter, you were provided a loan modification application filled out by Mr. Renshaw prior to January 4, 2011?
A. Let me say that, had I been provided an application for a loan modification, that doesn't meet the test for a valid loan modification.

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Borrowers are submitting those applications by the millions. It doesn't mean that --
Q. Right. Have you reviewed the servicing notes - GMAC Mortgage's servicing notes?
MR. STEELE: Well, just a second. Let Mr. Kahn finish the answer to your previous question.
THE WITNESS: In a real HAMP modification, there are worksheets, there are different Waterfall processes, and there are back and forths.
What I understood is that you haven't been able to reach them, which is understandable. I don't know how that would happen. I don't know how one goes about that in this case.
BY MR. McGEE:
Q. Okay. So --
A. Are you telling me that the parties here have made HAMP, or HARP, or any type of loan mods negotiations?
Q. No loan mod was approved, and Mr. Renshaw did apply for a HAMP modification and was denied prior to the initiation of the lawsuit.
A. Why - upon what basis was he denied? Probably his income is too low.
Q. I mean, the documentation is all - I think

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Mr. Steele probably has all of the documentation.
A. I provide a service to evaluate the MPV.
Q. Sure. I understand. If you haven't seen it, you haven't seen it.
Finally, you indicate here in Number 9 that you can testify that consumer protection requirements have not been followed. Is that kind of in the same vein as the prior one about loan modification requirements --
A. Exactly.
Q. -- i.e. - and maybe I'll rephrase the question. I understand that some States are passing legislation, and I think Idaho even recently passed legislation providing for more consumer protection provisions to be provided to a borrower when - either prior to, or when they receive their Notice of Default.
Is that what you're talking about here?
A. I'm talking about the - I'm sorry. I started to look at a piece of evidence within Exhibit 9 while you were speaking.
I'm talking about the HAMP and any other additional State remedies that may exist. But in my particular case of concern, I don't look to individual State consumer protections. That may be

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Q. So you don't actually look at the consumer protection requirements to determine whether they've been followed?
A. I don't look at the individual State requirements, because I testify in some dozens of States, and I'm not able to stay current on any particular requirements.
And I believe that most consumer protection requirements that are made at the State follow and enhance, and may embellish upon, the Federal level requirements.
In this particular case, what I'm referring to, you've got a Federal GSE, Freddie Mac, claiming to own the loan. They have Waterfalls, four of them - or I'll say about four of them - that could be considered lowering this borrower's payments to a 31 percent debt to income ratio. And I don't see where any of those Waterfall tests have been made.
What I do see is a barreling down the railroad path to foreclosure, and I understand the reason why - because this loan has been - is in defective conveyance to Freddie Mac, in my opinion, based on the evidence and, as such, can be made or

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forced to be repurchased at any time.
And, therefore, the parties - MERS, who is GMAC here, and GMAC, who doesn't want to buy this loan back and get mauled on it, would rather foreclose, and that takes the risk to GMAC out of the equation for them.
Q. So when you refer to the consumer protection requirements, you're referring to what, exactly - general concepts of honesty and forthrightness, or are you referring to a specific requirement in the consumer protection statutes, State or Federal?
A. I'm going to say asked and answered, and I'm going to tell you, again, that HAMP and Congress have established a Waterfall series of protections for consumers that start with HAMP, and HARP, and various other loan modification programs that have not been evidenced here. I can't be more clear than that.
Q. Okay. And it's your understanding that each and every Waterfall must be applied?
A. I believe that it's the congressional intent that each, or all loan modifications should be applied, and I think the Government and the administration has tried very hard to get loan

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servicers to do that.
But in a case like this, as in many other cases, but specifically in this case, it's just much more profitable to foreclose.
In this particular case, you've got a quarter of a million dollar loan, for example. Maybe it's worth - I don't know what it's worth, but maybe it's worth $200,000 because maybe it's in a good neighborhood.
So the loan - and Freddie Mac will take the hit of the $50,000. So if the servicer can buy this property at the Courthouse steps for, let's say $160,000, because nobody else is bidding, and sell it for $200,000, they can cross it against their accounting and make significant profits as opposed to their having a defective loan that is not underwritten properly, that's not conveyed properly, and have a modification that they're going to have to give a borrower a $400 a month payment, and eat the balance of it.
And that's going to hit their balance sheet hard. They're in bankruptcy, and those are just the facts. But I can see why they want to do it. However, borrowers have certain consumer protections.

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Considering that Homecomings, which you're now painting to be a party who may have acted properly, in a manner of speaking, we can't forget, of which I'm qualified as an Expert, that the loan that was provided by Homecomings to this borrower - and I'm not advocating; it is what it is - was designed to foreclose and put this borrower on the street in a predictable amount of time, which is what they're doing now, and which is what you're protecting or defending their rights to do.
And that amount of equity will be drawn by a Judge. That's why we're having this little Deposition.
Q. Okay. Why don't you turn to Page 5 of your report real quickly?
THE WITNESS: Hold on a second. We started at 10:30; right?
MR. STEELE: Well, it was noticed for --
THE WITNESS: 10:50, so let's say 11:00?
MR. McGEE: I think we started at around 10:45 Eastern. I'll try to make the rest of this as brief as possible.
THE WITNESS: Let me just ask you: You're paying me for my time now. I'm in overtime; correct, Mr. McGee?

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MR. McGEE: Overtime - do you charge an overtime rate?
THE WITNESS: I charge three hours - actually, I charge four hours, minimum, but for you I modified it to three hours, minimum. And then I get paid for each hour, at your request --
MR. McGEE: Sure.
THE WITNESS: -- to continue. But I get paid right now, today. And I just wanted to make sure that you're going to do that.
MR. McGEE: Well, you'll be paid. I don't know that we'll be able to get it - as far as I know, we still do not have a W-9 for you, which --
THE WITNESS: By the way, I haven't been asked for a W-9.
MR. McGEE: I sent the W-9 - maybe we need to go off the record real quickly.
THE WITNESS: Okay.
MR. STEELE: Well, let's just stay on the record.
Well, yeah, we can go off the record.
(Thereupon, a discussion was held off the record.)
BY MR. McGEE:

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Q. Okay. Why don't we go back on the record.
All right. So if we turn to Page 5 --
A. Let me ask you this: If I provide you the W-9 today - and I'll give you my Tax ID right now, if that's what you're asking for, when will I receive my payment that I'm supposed to receive at the end of the Depo?
MR. McGEE: Why don't we go off the record again?
THE WITNESS: I'd like to be on the record because, normally, if I'm not paid, I get up and walk out.
MR. McGEE: If you're not paid, you walk out.
Okay. As I indicated, I assure you, you will be paid.
THE WITNESS: I'm asking you --
MR. McGEE: I don't think we'll be able to make payment at the close of the Deposition.
THE WITNESS: I'm asking you when.
MR. McGEE: I don't know.
MR. STEELE: Well, Mr. McGee, you told me you were able to make payment within three days, and three days, I guess, would be Friday?
MR. McGEE: Yeah. Three business days is

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- that's our normal practice. We'll get the check out as soon as we get the necessary information, and you'll receive payment.
MR. STEELE: Do you have your Tax ID number with you, Mr. Kahn?
THE WITNESS: Yes. Let me get that for you, please.
MR. McGEE: Now, obviously, I don't know, Mr.
Steele, to the extent --
THE WITNESS: I'm ready.
MR. McGEE: -- that we're putting this on the record here --
MR. STEELE: Uh-huh.
MR. McGEE: Do we want to concern ourselves with stipulating to a Protective Order about this information? That's kind of why I prefer that we handle these types of payment issues, to the extent
Social Security numbers, or Tax ID numbers, are involved, off the record.
MR. STEELE: Mr. Kahn, do you care about keeping your Tax ID number private?
THE WITNESS: Well, I guess I don't want to have the whole world know it. But anybody can

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find it out; correct?
MR. STEELE: Yeah.
THE WITNESS: I'll go off the record to give my number, if you don't mind.
MR. STEELE: Okay. Let's go off the record.
(Thereupon, a discussion was held off the record.)
BY MR. McGEE:
Q. Okay. So, going back on the record, at Page 5 of the report, next to the date 6/10/2009, it states "Homecomings Financial, a GMAC company, notice to Gregory Renshaw loan servicing transfer notice. Affiliated servicers, Homecomings and GMAC" - et cetera, et cetera.
In your Expert opinion, what is this? What does this reflect? Or based on your experience in the industry, what does this reflect?
A. You mean, from Line 24 to 32?
Q. Yes.
A. It seems to be a notice - a loan servicing transfer notice.
Q. Okay. And what does that mean to you?
A. Let me - may I open up the document to review to refresh my memory, that was sent over,

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upon which I make my findings? Can I do that?
MR. STEELE: Go ahead.
THE WITNESS: Okay. So you're asking about 6/2009. I am having difficulty in locating - oh, miscellaneous GMAC letters. It's probably in there. It's a Homecomings letter. Let me see.
Here's the letter. Is it June 10th, 2009?
BY MR. McGEE:
Q. Yes.
A. Okay. It's to Gregory, "We're writing to notify you that the servicing of your mortgage loan, that is, the right to collect payments from you, is being assigned, sold or transferred from Homecomings to GMAC, effective July 1st, 2009."
That's what it says there. Loan servicing transfer notice. So that's correct.
Q. Okay. Now, based on your understanding of the fact that it appears Homecomings sold any ownership interest in the loan down the line, and it appears to reserve servicing rights as of July 1, 2009, did Homecomings Financial have anything to do with the loan at all?
A. It appears that Homecomings was servicing the loan, and transferred servicing rights. Let me check the Min and see if that conforms to the

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Milestone, and then - yeah. Homecomings was registered as the servicer, and remained as the sub-servicer and then, on 7/6/2009, the old servicer was Homecomings Financial, and then transferred to a new servicer, which was GMAC. So it conforms.

That letter conforms to your MERS Milestone report.

Q. Right. So my question is: As of that date, is it your understanding that Homecomings had nothing to do with the loan?

A. You mean, after that date?

Q. Right.

A. So, more recently than July 1st, 2009?

Q. Correct. Let's say, as of August, 2009, did Homecomings have anything to do with Mr. Renshaw's loan?

A. It appears not. Now, Homecomings, and ResCap, and GMAC, they're all owned by, you know, they're all owned by the same group of companies.

Q. Sure.

A. But it appears that their servicing was handed over to GMAC, the parent. That is in conformity with the FDIC investigation that I mentioned earlier in the Depo that said, in 2009, they kind of ceased to operate.

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Q. Right. So my next question is, you know, if you were Mr. Renshaw, would you name Homecomings Financial as a Defendant, or would you name GMAC Mortgage as a Defendant?

A. I wish I was an Attorney. I'd probably be much more successful and be able to help more people. But as just a simple investigator, I can't give legal opinions.

If I was Mr. Renshaw, would I name Homecomings, or any other party? If I was Mr. Renshaw, I would do what I would do now, which would be consult a qualified legal representative like Mr. Steele, or yourself, and get their legal advice.

Q. Okay. In your opinion, based on the evidence you've reviewed, did Homecomings Financial have anything to do with the foreclosure initiated in this case?

A. Oh, yeah. Well, in my opinion, if you're asking me --

Q. Right.

A. -- I would sue Homecomings left and right with everybody else for tricking me in to a loan that they made so much money off, that they knew was going to default, and put me out of a home I built as a paraplegic that I could actually live in

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without living in a hospital facility.

I would sue the living daylights out of them because they defrauded me, and stole my home from me.

Now, I'm not an advocate for Mr. Renshaw, but you're asking me what I would do if somebody sold - lied about my income, raised the par pricing of loan financing, took a big profit on it, sold me a loan that was going to suck out all the equity, if any, that I had in my home, and leave me homeless in a few years - would I include them in the litigation? My answer would have to be, absolutely yes.

It may be under - it may not be under the same reasons I was suing MERS - you know, misrepresentation and fraud in the foreclosure action - but, if I could, I would bring some other type of consumer protection actions if they existed against Homecomings for having dumped me on my mortgage when I trusted them.

Q. Right. So you would sue them related to the origination of the loan, but perhaps not related to the foreclosure?

A. Absolutely. In my own personal opinion, I would definitely want to sue, and hope that I could

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sue them for the origination.

Q. Sure. Okay. We'll just go through your report. I have a couple of questions about a couple of your - a couple of components of your analysis. Turn to Page 8 of your report, please.

A. That's my Page 8, or your PLF-8?

Q. It's your Page 8 of Exhibit 9. At the bottom right-hand corner, it's 03024.

A. I'm there.

Q. Okay. This Paragraph 1 ends with the sentence "Homecomings is not revealing its corporate structure." My question related to that is, is Homecomings required to reveal its corporate structure to loan Mr. Renshaw money?

A. My - I'm not referring to Homecomings having to reveal its corporate structure to loan him money. I'm referring to the nondisclosure in the foreclosure of the chain of title.

Q. Okay. So the issue you're taking with this is that Homecomings is not revealing its corporate structure --

A. To the Judge.

Q. -- initiating foreclosure?

A. To the Judge. They're not revealing the securitization - the problem with this foreclosure

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is, you're not telling the Judge, this was a securitized loan; we sold it to another; here is the chain; this is the way it is; we are related parties; and this is what we did.

So you're obscuring it from the Court.

Q. And just to - just as a reminder, Idaho is a nonjudicial foreclosure State. So, generally, these foreclosures - I mean, there is an option to do foreclosures judicially but, as a general rule, they're done nonjudicially. There is no presentation of issues to the Court.

A. I understand that legitimate, lawful --

Q. So does that change your analysis at all?

A. Well, I understand that legitimate, lawful foreclosures that are done by parties in a manner that we consider to be valid, are done in that manner.

But when there are material misrepresentations of intrinsic and extrinsic form, and questions as to rights and authority, and parties involved who were appearing to fabricate claims and documents, and surreptitious, unidentifiable bald claims, it appears to me that the nonjudicial process, and as has been confirmed by the National Association of Attorney Generals,

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may not be the appropriate venue in which to settle such questionable foreclosures.

Of course, that's a legal matter, but that - does that answer your question?

Q. Well, not really. But - you lost me there, but that's okay.

Why don't we go ahead and turn to Page 12.

A. Okay.

Q. The first line there says, "We find several revealing facts about the MERS assignment of the Deed of Trust that appear not to provide MERS with standing." This statement confused me because I'm not aware of any MERS assignment of the Deed of Trust.

Did you actually find one of those somewhere?

A. No. That appears to be a typo, and should say lack of assignment of Deed of Trust. That's one of the key issues in this case - is that there is no assignment.

Q. Right.

A. That's one of the gross misrepresentation of MERS. Rather than pretend to be in possession of a Note to the bearer at a time when they weren't, and go on the hook and misrepresent themselves in

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the manner that they have, which I don't know whether will be accountable to them or not - and that's not of my interest - it would have been proper, according to the MERS website, and all of the MERS directives, for MERS to issue a proper assignment.

In issuing a proper assignment, then a party can take what actions they have. This has left MERS, in my opinion, hanging in the wind a little bit - a lot. So whether or not it does, that's an infraction, and the consent order that I spoke about dealt with that in terms of MERS has changed its policies since we started this case, and they're addressing these aspects that those Federal agencies desire to hold MERS responsible under.

MR. STEELE: Hello? I'm getting -

MR. McGEE: I'm getting some buzz, too.

THE WITNESS: I started to hear it, but we haven't done anything.

MR. STEELE: And you're cutting out.

THE WITNESS: I think somebody has picked up a phone on your side.

MR. STEELE: I'm getting just buzzing.

MR. McGEE: I'm getting buzzing, myself.

THE WITNESS: I think somebody has picked

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up a phone on your side. We only have one phone.

MR. McGEE: Jon, you're connected through my phone. I mean, I'm on an independent line here.

MR. STEELE: I can hear you fine, Matt.

THE WITNESS: Can you hear me?

MR. STEELE: I can't hear Mr. Kahn at all.

MR. McGEE: I can't, either. Let's go ahead and, if we haven't already, go off the record.

(Thereupon, a discussion was held off the record.)

BY MR. McGEE:

Q. Okay. Back on the record.

Let's continue to look at Page 12. At the very bottom of Page 12, it states, "In this case, we find the loan servicer is seeking to foreclose via their MERS employee, without demonstrating current holder in due course documentation, or providing other authority to do so."

This may be repetitive, but can you just briefly explain what you mean by that?

A. Well, I think you've addressed that with your subsequent submission of documentation that GMAC, with your MERS Milestone, that Homecomings handed off the loan servicing. That wasn't - we didn't have the MERS Milestone.

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Q. Okay.
A. And I didn't see GMC mentioned anywhere else, to my recollection.
Q. So when you stated this, was it your understanding that Homecomings was servicing the loan, or GMAC?
A. Well, according to that MERS Substitution of Trustee, Homecomings was still servicing the loan, and there was no mention of any other parties. And I didn't believe that that was true. I thought that that was a misrepresentation. And it turns out that that is the case.
There was another loan servicer, because Homecomings ceased to be active after - in 2009 - according to those Federal regulatory authorities. So something was fishy, and I cited it.
Q. Right. And in light of the notice to Mr. Renshaw of the change of servicer to GMAC Mortgage, perhaps?
A. So I guess that the handoff was to GMAC Mortgage.
Q. Right. Okay. Look at Page 14, Subsection C states, "Nor do we find any evidence of an ongoing agency relationship to prove that MERS had any rights under an initial, original Deed of Trust.

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The evidence reveals that the Note and Deed of Trust have been sold, along with all beneficial rights therein to currently undisclosed parties."
I guess my question is for more to that first sentence. You state that you don't find any evidence of an ongoing agency relationship. What evidence would you expect to find, out of curiosity?
A. I guess it would be residential - could you tell me where, again, you were referring to?
Q. On page 14, the first sentence in Subsection C.
A. Could you give me a Line Number?
Q. Line Number 8.
A. In the - nowhere does it say - I didn't find where it said Homecomings, and then Residential Funding, and then Freddie Mac, or anything like that. All the reference is to the original Homecomings. Homecomings was defunct at that time. They weren't an active lender.
They weren't doing - they had sold already their rights and interests. So there's - no evidence was provided, or alleged, that the Note had been sold, except the endorsement by Dorothy Okech.
Q. So the evidence of an ongoing agency relationship between MERS and any given lender, you

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would expect to find where?
A. In the claims of rights to foreclose.
Q. Okay. Maybe I should of clarify.
A. Maybe in the terms of --
Q. Are those claims to an agency relationship, is it your contention that that's not governed by the Deed of Trust, itself? Do you seek additional documentation?
A. Let me think about that for a moment.
I'm giving you a couple of answers in the Sub Item, on Line 12. In other words, the transfer of servicing rights and authority.
Q. Okay.
A. I'm trying to flush out the servicers and disclosure by the parties involved to honestly come in and disclose what's transpired, so that I might investigate it, which apparently seems to have happened.
Q. Okay. So my question is, other than the authority provided in the Deed of Trust for MERS to act as nominee for the lender, and the lender's successors and assigns, what evidence of an ongoing agency relationship would you expect to find?
A. Well, an owner does not necessarily have to use MERS. If you have MERS on your mortgage, and

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I buy your whole loan from you, I don't have to use MERS. The fact that MERS is designated on the Deed of Trust is at the option of the lender, or the purchaser and owner.
And I could just simply walk down and record my mortgage. And I, personally, would do that so that, if you're not disclosing who the subsequent purchasers are, you're not telling whether or not they've also decided to use MERS.
So that would even further put in to question the authority of MERS to be signing on behalf of an undisclosed interim party. MERS is an option. It's not - it's a right; it's not an obligation.
Q. Okay. So you would expect - in any situation where a loan is sold, you would expect the purchaser to file a document, or send some correspondence, or something to that effect, reflecting that they were members of MERS, and that they were electing to utilize MERS to track the loan?
A. No. But if I didn't tell you who I sold it to, it would be a question.
Q. Okay.
A. There are several different types of

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securitization. You're talking here about GSE securitization. But a bald claim that Freddie Mac owns this loan without proof is not a claim of ownership that's valid. It's just a claim.

Freddie Mac has not proved ownership of this loan based upon the documents you've provided. Those documents do not comport to the documentation endorsements that the Freddie Mac loan would require.

So the claims so far that Freddie Mac owns this loan are questionable. They haven't produced the evidence that they can produce, or should be able to produce. The fact that you have a MERS Min with the understanding that the party that does that is the servicer, by the servicer's employee, is not proof of ownership.

The proof that Freddie Mac owns a loan, you would look to the endorsements to find that they owned the loan. Anybody could type a MERS Milestone report on a piece of paper. They counterfeit complicated bills. They can counterfeit everything.

If you want to prove ownership by Freddie Mac of this loan, you would look to Freddie Mac's guidelines, you'd make sure everything is correct, and then you confirm that, yes, it's been purchased.

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In your case, that's not the case. Those documents you showed me don't - are contradicted by the guidelines of Freddie Mac. At the point that I originally saw the loan, prior to your giving me this what I consider to be bogus follow-up of documentation, there was only a sale from Homecomings. We wouldn't know who the loan owner was; we wouldn't know who it was sold to. We only knew it was sold.

So if it was in a QSPE, or bank to bank security, or securitization, or a VIE, or any of those bankruptcy remote vehicles, they might sell the loan in any way that they want. That's the rights of a loan purchaser. And if I want to use a property clerk's registration because I like to do it, then I will.

MERS was created by the banks and, since 2000, it's been very prevalent. But, prior to that, you know, MERS was not used to the extent that it's been used now.

So, depending upon who purchased your loan, they may just decide that they want to register at a property clerk. That being the case, then the MERS signature would be even further undermined than it is already.

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Q. All right. So coming back to fundamentals here, in order to foreclose, wouldn't the lender just need to show up with a Note endorsed either specifically to them, or in blank, and be designated as a beneficiary of the Deed of Trust in order to foreclose a loan?

A. I believe if you have a properly endorsed Note, that the mortgage follows the Note, you just can foreclose with the properly endorsed Note. But that's a legal question. You're asking about a nonjudicial process - the legalities of a nonjudicial process foreclosure. I think that's best left to the Lawyers and the Court.

I'm just identifying the facts. I'm a fact witness - the facts and the evidence that I find. What you're going to make of it to the Judge in your Court case is going to be between, I guess, you and Mr. Steele. And it has really nothing to - it doesn't matter what I think, because I'm not qualified to think in that area.

Q. Okay.

A. I do notice, the next point, that you've cited some MERS Flint, Michigan, address. To my knowledge, MERS only has one Reston, Virginia, address.

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Q. Okay.

A. I don't - that's another reason for looking in to the question of, did these parties who are filling out these forms actually do their homework?

Q. All right. One last quick substantive question. Why don't we go ahead and return to Exhibit 4.

A. Which Exhibit?

Q. Exhibit 4, from a little bit earlier.

A. Okay.

Q. And turn to the last page there.

A. Okay.

Q. Now, about four lines down, there is a - it says "11/9/2007 update" on the far left - of course, there are a number of them that say that - and then next to that it says "investor loan number."

Now, that number just to the right of it is 19604557; is that correct?

A. I'm reading that. The before value, 19604557?

Q. Yes. And that's under the investor loan number field name; correct?

A. It's in the field name before value -

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investor loan number field name, before value, 19604557.
Q. Okay. Now, turning back to Exhibit 2 --
A. Which was what?
Q. The allonge to the Promissory Note.
A. Okay.
Q. Will you read that number next to Loan ID?
A. 19604557.
Q. And that appears to be the same loan number identified in this Min audit dated 11/9/2007; is that correct?
A. Those numbers appear to be the same. Who created in Min audit?
Q. I assume - I mean, it's a document provided by MERS.
A. And the MERS executive is the servicer?
Q. I'm not sure what you're asking me here.
A. MERS doesn't --
Q. I just wanted to, you know, in our previous discussions about this issue of where this loan ID number came from, and the fact that it isn't the right loan, I just wanted to draw your attention to this Min audit here, where the number is identified.
To the extent that that alters your

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opinion, or changes it, I'd be interested to hear about that. If it doesn't, that's fine, as well.
A. It doesn't change it, because the loan ID here which, first of all, I'm not sure who drew this up, and anybody could type a number in here. But for me to look at it and confirm that it would be legitimate, I would look to the date that's on the allonge, and then look to the date structure.
And I see that on 11/9/2007, the update, the loan numbers were not that loan number. And then, whoops, I guess I see another one up there that, on the same day, seems to update it to another number, which updates it to another number, which updates it to another number.
And that little machination in there is just to my finding along the lines of everything else that's been going on here to seem to be a convenient little hiccup. But, in reality, you're going to tell me that that loan number changed on the same day from one number, to include your number, back to another number, none of which all of the numbers are the same, and none of which is the current number.
It just is not, to me, any type of supporting evidence of anything, except that the

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party who drew this has added that loan number to appear, for some short time during a day, as one of the three or five loan numbers placed on this loan to include something that may be seen to be made legitimate.
Considering there's a quarter of a million dollars at stake, and misrepresentation and intrinsic fraud, and that MERS and the Min, and the parties involved are the parties who have been signing and drawing everything to their own, it doesn't surprise me that I find it.
But it certainly doesn't make a difference because Freddie Mac didn't purchase this loan in 2007; right? Did they? Hold on one second. In June. So I don't know if what you're trying to --
MR. STEELE: They purchased the loan in October of 2007.
THE WITNESS: This loan was made in June of 2007.
MR. STEELE: That's correct.
THE WITNESS: Freddie Mac buys the loan at origination.
MR. STEELE: They did not buy this loan - if you look on the Min Report, it shows November 9th, 2007, on the very first page.

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THE WITNESS: Let me see.
MR. STEELE: Look at the very first page with the Min transfer on it.
THE WITNESS: Hold on a second. I'm trying to look at the Milestones here. The transfer of beneficial rights was done on 11/9/2007; correct?
MR. STEELE: Right.
BY MR. McGEE:
Q. Is it possible that this before value was Homecomings' loan number ID, and then it was changed on 11/9/2007 to this 329333062 number because of the sale to Freddie Mac?
A. Say that again?
Q. Is it possible that this loan ID number reflected on the allonge was changed to the after value of 329333062 as a result of the sale from Homecomings, ResCap, to Freddie Mac?
A. Where do you tie the loan of 329333062 in to this at all?
Q. Well, I'm looking at that Min audit that we were talking about earlier.
A. But where in the --
Q. And the before value of 19604557 --
A. Right.
Q. The date of that update is 11/9/2007.

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That is the same date reflected in the MERS Milestones that Freddie Mac, the beneficial rights were transferred to Freddie Mac. The after value is a different number.

Is it possible that that different number just reflects an updated loan number for Freddie Mac in light of the sale to Freddie Mac - in light of potentially two different numbering schemes between ResCap and Freddie Mac?

A. I guess that it could. You're asking, is it possible, and I would answer, it is possible. But it doesn't - I don't see where the loan number 329333062 is related to that. I see the allonge has a different number on it. I see that the allonge, which was supposed to be in blank is made out to GMAC Mortgage, and so it doesn't conform.

But I suppose that the answer to your question is, anything is possible when you're the one who is controlling the input, and you're the one who has entry to a system. The MERS interface is accessible by these parties who are signing.

So they're all in an undisclosed conflict of interest, and anything is possible.

MR. McGEE: Okay. Well, I don't have any further substantive questions today.

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I would note, for your information, Mr. Kahn, that we have moved to vacate the Trial scheduled for July 10th so that other Counsel can substitute in. And so I obviously - and we've also moved to withdraw as Counsel of record for MERS.

So in the event - but the Court has not ruled on either of those motions, so we're obviously doing our best to prepare for Trial in this case.

In the event either or both of those motions are granted, I certainly do not want to cause any problems for subsequent Counsel, and I would reserve for MERS' benefit, the right to notice a Continued Deposition of Mr. Kahn should the Trial be vacated to another date.

And so that's all I have. Mr. Steele, do you have anything?

MR. STEELE: Yes, I do.

CROSS-EXAMINATION

BY MR. STEELE:

Q. Mr. Kahn, thank you for your patience today. You indicated that you had a copy of your book with you today?

A. Yes.

MR. STEELE: And I'd like you to - I'd like Catherine, our Court Reporter, to mark that as

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Plaintiff's Exhibit 1.

(Plaintiff's Exhibit 1, Book titled Winning against Foreclosure, authored by Richard M. Kahn, was marked for Identification.)

BY MR. STEELE:

Q. And, Mr. Kahn, is it right that any of your opinions are based upon your treatise, which is Plaintiff's Exhibit 1? Many of the support for your opinions today are found - much of the support for your opinions are found in Plaintiff's Exhibit 1?

A. Yes. I have - especially the center section of on securitization.

Q. Thank you. Mr. Kahn, this is not the first round of sub-prime loans that our economy has suffered through. Were you involved in the first series of sub-prime loans back in the 1990s?

A. You mean - I believe you mean in the '80s.

Q. Excuse me. In the '80s, yes.

A. Yes.

Q. And what was learned as a result of the experience of U.S. economy and sub-prime loans during the 1980s?

A. In the 1980s, the Government profited greatly from bailouts as opposed to the current situation, where we appear to be, or have spent

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nearly a trillion dollars, and in a manner that's unaccounted for, would be the prime thought that comes to mind.

I think that they - meaning the Government - decided to go that route because of the manner of profitability the bailouts that occurred in the '80s found the Country realizing. The amounts of money were much less.

Q. Was one of the other lessons that was learned is that you can continue to make sub-prime loans - just don't hang on to them?

A. The - I don't know if that was really learned in that. I think what was learned in that environment was, don't let the investment banks and the commercial banks get together, because it would be much worse.

Q. But that's what has happened; is that right?

A. That is what happened with the Repeal of the Banking Act in 1999 - November of 1999.

Q. That was the Glass-Steagall Act you referred to?

A. Yes. The collapse of markets in the 1980s was, in great part, precipitated by the Tax Reform Act of 1986.

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Q. Okay.
A. And it was not so much the sub-prime as you know it today. It was the high multiple write-off sub-prime style lending, where you took a property and blew up its value with high tax write-offs and created sub-prime style commercial property investments. And it resulted in - it was a different market than the residential, and it resulted in very high interest rates and tremendous losses.
And it was found to close the loopholes of the high tax write-off tax shelters, and introduce the opportunity for what you call the residential sub-prime, and that would be available to REMICs.
So the REMICs were created as a result and, then, in 2000, when the Glass-Steagall Act was repealed, it was the residential sub-prime, and not just sub-prime, because you have the cases of the entire secondary market being undermined when Freddie and Fanny started to chase the established profitability of the private sector sub-prime, and move what was inherently traditionally designed to be the support of the secondary market in a blind leading the blind, so to speak, direction in to what culminated as the financial crisis of 2007 and 2008.

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Q. Well, let me ask you this: The 1980 collapse, that was based upon the fact that local savings and loans, that had not been created to make home loans, were all of a sudden granted authority to get in to the commercial loan business; do you recall that?
A. Yes.
Q. And it resulted in a number of irresponsible loans being made, and those loans were then securitized and sold as securities; do you recall that?
A. Yes.
Q. Okay. And then, to accomplish that, we were introduced to what's called the Uniform Form of Deed of Trust, and that became a Deed of Trust form that was used through most of the United States, and the reason for that uniformity - that the uniformity was required - was so that the loans could be packaged, and resold as securities.
Do you recall that?
A. My activity in the '80s was in commercial mortgage and mortgage backed securities. And the intricacies of the Deed of Trusts on residential mortgages was not of a main concern until the advent of the RMBS with investors.

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Q. What is the RMBS?
A. The Residential Mortgage Backed Securities which grew out of the 2000 repeal with the investment banks.
Q. Okay. There were some sub-prime lenders that went bankrupt in the early 2000s. I think one of them was Fairchild. Do you recall that name?
A. I recall the name, but I don't recall the circumstances.
Q. Okay. Now, you mentioned during Mr. McGee's examination that there was an FTC opinion or report which concluded that Homecomings had ceased business, or gone out of business in 2009?
A. It was an FDIC.
Q. FDIC - Federal Deposit Insurance Corporation?
A. Yes.
Q. And why is it, if you know, why Homecomings ceased to do business in 2009?
A. Well, it's laid out pretty much in the findings. I think that it's laid out in the letter of the FDIC, and if you send me an e-mail, I'll happily send it to you, and you can forward it on to opposing Counsel.
Q. Okay. I would like a copy of that.

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A. I think that, in general, by 2009, with the complete collapse of the financial markets in 2008, there were no more investor funds pouring in to buy toxic mortgage backed securities. So all of these organizations that were now huge with thousands of employees, and offices, and everything, were imploded, so to speak. They collapsed.
Also, with - I believe it was almost a one-month transition, the collateralized - the CDS, the Credit Default Swaps - which were some $60, plus, trillion globally, or about eight times the global market of world product, were devalued to about half of that.
And so companies, corporations, funds lost about $30 trillion of value overnight - almost overnight; over the course of a month - and that was caused by the SEC creating with the FASB, the Federal Accounting Standards Board, creating the mark to market, where you don't market your bonds - you don't value your bonds now at their maturity rate; you value them at what they are worth today on the trading platform, along with the SEC's Repeal of the Uptick Rule, which was a support level for resisting the marketplace to crash.
And with the crashing of the market, and

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crashing of the assets, banks who were required to maintain certain capital ratios on their balance sheets and assets were finding themselves having to sell lock, stock and barrel in a spiraling downward trend to cover their positions to maintain their viability and, as they watched themselves selling for pennies on the dollar.

That's why hundreds of lenders just disappeared.

Q. And that was because they were required to maintain a certain ratio of assets to debts; is that correct?

A. They had to - the capital ratio is a measure by which a bank is allowed to operate. It was by the Office of Thrift Supervision, for example, that would say, you know, you have to have so much in cash, and so much in assets, and so much in debt on your balance sheets. And if - you have to maintain those ratios for accounting.

And they found themselves holding assets in Credit Default Swaps that were worth, let's say, X, and the next day they were worth one half of X. Now they had so much debt, and half of the assets. They had to sell whatever they could to raise their cash assets so that the capital ratios would be

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sufficient, except that buyers of cash assets decided that, well, everything is plummeting; why not wait a couple of days?

And a lot of the holdings that everybody had, including the banks, were margined, and not all of the money was borrowed, which magnified the problem. So where they had to cover a dollar's worth of assets, they may have only had $.20 in real assets. Now they had to sell enough to get not only the $.20, but the other $.80 that evaporated in to thin air. I write all about that in my new book. I'm glad you're asking.

Q. And when does your new book come out?

A. Well, it's about three quarters done, and if I wouldn't be so busy every single day, it should have come out last month.

Q. I understand. What are these Credit Default Swaps you mentioned?

A. Credit Default Swaps are a commodity that is made over the counter between two parties that bet on the outcome of insurability of a particular asset. So if your asset were going to default, we'd pay you this, and then - a Credit Default Swap is kind of just like an insurance policy, so to speak.

Q. And you mentioned the word tranches. What

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is a tranche, and how does that relate to a Credit Default Swap?

A. The tranches is a French word for slice. So when - in the middle position of the bankruptcy remote vehicle that is illustrated in my - I think I gave you - it's in Exhibit 9, on Page 22, in that area, what happens is that the depositor goes ahead and takes individual loans, pools them together, and takes excess insurance in the form of, let's say, one of those Credit Default Swaps to support the perceived ability of the loans to pay back, so that a credit rating agency would take a borrower whose credit might be 700, and turn it in to Triple A, institutional grade investment quality.

And, in that manner, they divide the loans in to a senior, mezzanine, junior, residual types of groups. And those groups are sometimes called slices but, traditionally, they're called tranches, which is the French word for slices. So you may have a tranche that's Triple A and paying seven percent, and another one that's maybe AA, that's paying eight percent, et cetera.

Q. So the more risk involved in the tranche, the higher the interest rate?

A. Generally speaking, in the credit markets,

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the more risk involved, the higher the interest rate. What they did in the MBS is that they took the higher interest rate mortgages - for example, if you have a mortgage of $100,000 at just a marginal credit of, say, $8,000 - eight percent per year - and you were to sell that as Triple A now to a group of borrowers that perceived it as Triple A, and they were willing to pay four percent in a two or three percent market, they would now pay you $200,000 for that $8,000 worth of cash flow.

So, in that case, by raising the credit enhancement of the borrowers in a fictitious, fabricated, exploited manner, they were able to sell, let's say, a billion dollars of loan cash flow to a group of investors that may only have been valued at half a billion dollars of actual loan mortgage payments.

Q. So you mentioned also a - was it a CDO?

A. CDOs, Credit Default Obligations.

Q. Are those the same as Credit Default Swaps?

A. No, they're not. They're just a group - they're like a bond. Excuse me. Did I say Credit Default? I meant to say Collateralized Debt Obligations.

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Q. Well, I probably got it wrong.
Collateralized Debt?
A. Collateralized Debt Obligations. I'm sorry. I said something else. Collateralized Debt Obligations are like CMOs, Collateralized Mortgage Obligations. They're just basically mortgage bonds, and bonds like the mortgage backed securities.
Q. Well, who is it that these payments were made to by these investors who purchased these cash stream - the cash flow of mortgages?
A. They were made to the issuers through the investment banks. So in Renshaw's case, they were made to Freddie Mac. In many other cases, they would be made to, let's say, the Bear Stearns Asset Backed Security Trust, a Trust formed for the purpose of selling mortgage backed securities.
Q. So you're telling me that, for instance, if a loan of a Note and Deed of Trust were in the amount of $100,000 that gained interest at eight percent, that investors would pay $200,000 in cash for that possibility?
A. Well, if they were buying it at four percent, they would.
Q. If they were buying it at four percent?
A. Yeah. Because $8,000 at eight percent

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would be $100,000. And, you know, the borrower has no credit rating. Now, with the Credit Default Swaps insuring the tranche group of loans, and carrying the Triple A rating, institutional buyers will pay an amount commensurate with a return for triple A, which is much less than eight percent.
If we're in this example using four percent, it would be - they'd paid $200,000. If it was two percent, they'd pay $400,000.
And those are called interest strips. They can strip them off, and then they can sell them in NIMs, Net Interest Margin MBS. They could sell that interest to other parties and make even more money.
Q. You said that's called stripping?
A. Interest strips, yeah. In the old days, it was wraps. An interest strip is where the promoter ad the depositor, or the parties involved, would strip off, say, four percent of interest, or two percent of interest, and only transfer to the trust that lower amount of interest.
They'd retain the other interest to sell to the other parties.
Q. And how could we determine if that happened in Mr. Renshaw's case?

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A. You could get Freddie Mac to divulge which Trust they sold the loan in to, and then get the distribution reports of those Trusts and if, in fact, they did buy this loan, which is questionable at this time - and I could figure that out pretty easily.
Q. Have you been asked to figure that out?
A. I have a service that figures it - that does it, but I haven't been asked in this case because I haven't been provided the confirmation that Freddie Mac even owns this loan.
If Freddie Mac owns this loan, they'll just tell you, you know, what Trust it's in, and they'll be very up front with it. They're not hiding anything that we find these parties having to extract things with forceps, so to speak. You request it, they divulge it, and it's just simple like that. None of this everything being a mystery goes on in that legitimate transactional environment.
Q. Would that be considered public information?
A. Well, it's a public corporation. Freddie Mac will tell you - if you ask the other party to have them produce it, they should just, without

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hesitation, produce that.
Q. And those would be the securitization documents; is that right?
A. Yes. The trust and pool information that Freddie Mac securitized this loan in to if, indeed, that transpired - because, so far, I know that there's been some documents provided to me at the last minute that are supposed to support that.
But as of yet, I haven't really seen anything besides these parties submitting more of their own supporting documents. So that would be nice to see - would be Freddie Mac stepping to the forefront and producing some evidence.
Q. Now, Mr. Kahn, are you familiar with the term, Spa, S-P-A?
A. I am not familiar with that. What does it mean?
Q. Well, I may be wrong, but --
A. You mean, SPV.
Q. SPV. Yeah. What's an SPV?
A. An SPV is a Special Purpose Vehicle that a bankruptcy remote entity - is that what you're talking about?
Q. Well, no. Actually, I was thinking of a servicing agreement between GMAC and, I believe, the

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Treasury Department that allows them to process HAMP modifications, or loan modifications.
A. All of the major lenders agreed to those modifications with - under the congressional rules. And they were actually mandated to make modifications, but they didn't.
They're hardly modifying, and it's become a point of controversy.
Q. Well, why would they not make modifications?
A. When you modify a loan, you have a potential for - well, you have various things. First, the REMICs were static trusts, and could only modify about five percent of their mortgages.
So a thousand mortgage pool could only modify fifty loans. Aside from that, in reality, that if you modify a loan that benefits the senior tranche, and they benefit, well, then the subordinated tranches are going to lose out. So what you're going to have is a class action lawsuit.
The subordinated tranche is going to say, hey, whoa, you're modifying to benefit those holders, but we're holders, too - so what about us? And so, what happens is, you have a scenario where the parties are juxtaposed to the investors who they

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represent.
Q. Well, when you make reference to a class action lawsuit, you're not talking about homeowners; you're talking about --
A. Investors.
Q. -- investors who purchased the securities?
A. Oh, yeah. And there are some tremendous mega lawsuits right now that are going on amongst the investors. Deutsche Bank, for one, against IndiMac and, you know, billions and billions and billions. They're happening.
Q. And they're happening because the investors don't want to get stuck with the losses; is that right?
A. Well, yeah. The investors are - they're happening with Freddie Mac and Fannie Mae. This loan - this type of transactional documentation that you see in this loan, which is typical of the fabricated loan documentation that Freddie Mac and Fanny Mae have found, they have forced to repurchase these types of toxic, defective loans in the billions, but the lenders won't buy them back.
And when your opposing Counsel suggests that GMAC bought this loan back, well, I'd like to see it because - I'd like to see that quarter of a

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million dollar check made out to Freddie Mac. Those checks aren't forthcoming, and that's why Freddie and Fannie, who were Wallstreet darlings, high flying stock prices, are now delisted penny stocks - because they are suffering, as well as American taxpayers because the Federal Reserve has had to dole out, say, a quarter of a trillion dollars to those entities to continue paying the interest rates and payments under the Freddie Mac and Fannie Mae certificates.
We're all suffering.
Q. Now, let me ask you this: Is what you're referring to - are they known as TARP payments?
A. No. That's in addition to the TARP payments. The Trouble Asset Relief Program are additional payments. In many cases - that was one of the reasons why Homecomings, in that FDIC letter, and that confirmed that they were out of business, they wondered if GMAC's changing in to a bank entity in order to receive troubled asset funds would have any impact.
So there's a lot of games that were played for these banks and these propagators of this travesty, as it turns out, to selling toxic loans to borrowers - hurried to get on the food line of the

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Federal Government and receive what's arguably close to a trillion dollars in funds paid in an unaccountable manner. That has been a controversy that --
Q. How is it that - you know, my generation believes GMAC to be a car company. How is it that GMAC got involved in residential lending?
A. GMAC, if you look at their bankruptcy in those, what, fifty some odd companies, I guess it's just any healthy corporate environment. You know, buy companies, expand, and just keep getting in to the finance business.
And GMAC is and was a lender in asset backed - you have mortgage backed securities, which mirror asset backed securities. Mortgage backed securities are assets, but a whole world exists in other asset backed securities - credit card debt, equipment loans, car loans, boat loans, loans that have assets.
And they're sold and securitized in the same way, but those assets have not been undermined to the extent of the mortgages because of the predatory nature of the parties that originated the mortgages.
MR. McGEE: I just want to interrupt real

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briefly.
Jon, do you anticipate this is going to be much longer? Because if it is, I'm going to go have Ms. Renshaw notified that we're not going to be doing her Deposition today.
MR. STEELE: No. I'll - we'll wrap up in a few minutes here, Matt.
MR. McGEE: So should I not let her know?
MR. STEELE: No. I think I'll be over to your office in just a few minutes for that Deposition.
MR. McGEE: Okay.
BY MR. STEELE:
Q. Let's see. Mr. Kahn, you mentioned something about an Ohio Federal Court opinion during your Direct Examination. Do you recall that?
A. I was referencing a MERS document that was talking about some opinions in Ohio and, although I wasn't looking at it from the legal aspect, I was looking at it from the description of MERS as to the position and process they must take to legally uphold the rules. And I have that, and I'll be happy to send it to you.
Q. If you would, please. I'm about done. Just a couple more notes here.

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Oh. Mr. McGee was asking about Section 13 and 18 of Mr. Renshaw's Deed of Trust. Do you recall that?
A. I do.
Q. And my reading of those two sections were that it prohibited the borrower from transferring his interests in the property without obtaining lender approval. Would you like to take a look at those sections - 13 and 18 - to see what they say?
A. Sure. Of the Deed of Trust, or --
Q. Of the Deed of Trust, yes.
A. Section 13 is Joint and Several Liability. Was he talking about the Note, or was he talking about --
Q. I believe that was the Deed of Trust. Yeah. It would be on Page --
A. Section 13 is on Page 10 of 15.
Q. Yes.
A. Co-signers, successors - Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several?
Q. Yes. Those are the borrowers covenants; they're not the lender's - right?
A. Those are the borrower's covenants.
And the other one was 18?

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Q. Section 18, yes.
A. Transfer of the Property or Beneficial Interest in Borrower?
Q. The due on sale clause; is that what you understand that to be?
A. I guess if any of the property is transferred to anybody else, that the due on sale clause may be able to be exercised. Is that what you're asking?
Q. Yes. Uh-huh.
A. Right.
Q. Okay.
MR. McGEE: Just to interpose an objection. I think that's - the reference to my question misstates the record, in that I don't believe I addressed Section 18 in my questioning, Mr. Kahn.
THE WITNESS: I wasn't - I actually don't recall the items of the questioning. I only recall that we did review some items. Because after six hours of Deposition --
MR. McGEE: I was just stating my objection.
You can continue with --
THE WITNESS: I've kind of forgotten which

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particular items, and I'm just happy to turn my attention to the item that is being referenced.
BY MR. STEELE:
Q. I'll wrap up here. I'm sorry.
You did mention that MERS requires written instructions from the lender. Do you have a document that shows that?
A. I can - I will send you supporting documentation for that. I'm not - would you mind if Carissa could please send me a request?
Q. Yes. I'll do that, and I'll copy Mr. McGee on it.
You also mentioned, I think, was the CUSIPs?
A. These are the different tranche owners of the different portions of the loans - their identifying number.
Q. The tranches?
A. Right.
Q. Okay. And you also mentioned cross-collateralized insurance. What is that?
A. That would be - an example would be those Credit Default Swaps that we were talking about.
Q. Oh, okay.
A. But there were also insurance policies

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that they can buy. And in cases, for example, the senior tranches that are the highest rated and the lowest paying, they may have had a policy purchased to pay for, or guarantee payments for, a certain stipulated amount of their investments.

So, for example, maybe their tranche was $100 million. They may have additional insurance to cover losses up to $30 million, for example - or something like that - in addition to any other types of privately traded swaps and commodities.

Q. You also mentioned that there's a document custodian, and you mentioned it's like Fort Knox that holds the original documents. Have you seen one of these facilities that holds the documents?

A. Yes. When I was on Wall Street, and I had the opportunity to see down there some of the document custody, all of the brokerage houses had document custody. You would go up to the window, you would hand in your bearer bonds.

Anything that was bearer, they had it - Chase had it right down on Broad Street, I think it was, and Merrill had it on One Liberty Plaza where I was --

Q. So you would expect there to be a facility like that in Mr. Renshaw's loan?

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A. The custodial handbook from Freddie Mac and Fannie Mae designate the types and conditions of a custodian. If you ask me for it, I'll obtain it and I'll send you a link to it. All that stuff is public. It's on AllRegs.

Q. All right. Now, Mr. McGee asked you a bit about bifurcation, which you described as a physical separation of the original note from the Deed of Trust. Why would that be done?

A. When you have MERS involved in these securitization Trusts, you have a case where the mortgage doesn't have to be transferred from owner to owner to owner along with the Note as it did in the older days.

And so the Note might get set - the mortgage might get set and now in to custody. And now MERS is going to take the interim property clerk's recording upon their own operation but, yet, the Note still gets endorsed and passed on as evidence of the ownership.

And so often in the cases where they were supposed to have both documents transferred, they didn't. They should be, but if they can't evidence it, then they're not.

Q. In other words, your comment that the

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mortgage always follows the Note, that's been the traditional understanding in the mortgage industry; is that right?

A. Well, it's pretty - yes. In the industry, it's known that the mortgage follows the Note. For example, if you had a vehicle, and you had the title in your hand, you wouldn't necessarily have to show the registration.

Q. Right.

A. If you had the registration, you're not going to prove ownership with it. You'd have to come in and show the title.

Q. You also mentioned that the document - the Notice of Default had been recorded at the request of LSI. And you also mentioned that they were under investigation, as well as LPS, Fidelity National and a couple of other entities. Do you have any documentation showing that?

A. Oh, sure.

Q. Could you also provide that to us?

A. Absolutely. I hope you're making a little list.

Q. Yes, I will. Okay.

A. Although, you could go right to, for example, the Attorney General of Florida, or just

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Google it and you'll find it. But I have it in my libraries.

Q. Okay. Well, it will probably be easier if I asked for it from you. And, also - I'm sorry. I've got just a couple more questions.

When performing a HAMP calculation, are there certain variables that have to be plugged in to the calculation?

A. Yes, but they're kept a mystery. I happen to be privy to it.

Q. You happen to be privy to it?

A. Yes. I'm not sending that anywhere else. That's an asset.

Q. Oh, okay.

A. But I'm aware of the intricate line items that are considered.

Q. And let me ask - can I ask you what those are, or did you tell me you weren't going to --

A. No. I have those, and they're put in to spreadsheet form that I have a little prom that I've written using them. But they don't make them public. So it's a proprietary asset that I have a service that we charge a nominal fee for, and we will asses the NPV before the client goes ahead and submits the NPV.

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Q. What is the NPV?
A. It's the net present value of the tests. They're net present value tests.
In other words, they want to know all of your expenses in the property value, and everything else, that you have about enough money to pay the mortgage modification. Most borrowers mess up because they want to appear poverty stricken, so they make the numbers to the point where they can't afford to pay the modification.
And the NPV program I've written makes sure that the numbers come out in the range of acceptability, according to the Government Standards. But you'd think that they would just go ahead and provide an open source access to that. But, of course, if they did that, then everybody would qualify for mortgage modification, and they don't want to modify.
So it is what it is.
Q. What are the - you mentioned the four Waterfalls. What's a Waterfall?
A. These are different types of programs that you can try out for. You start out with one, and then you go to the other, and then you go to the other - on the way down to saying, okay, sorry.

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Can't modify.
So maybe the first might lower your interest rate, and then the second might lower your principal, and the third might change your term and try and work out modifications to see how far they have to bend before they give you one that fits.
Q. And what if they have to go through all four?
A. You're going to get a good loan modification.
Q. And you also mentioned HARP? What is HARP?
A. This is for parties who are not really in default, but would like to modify their loan program.
Q. Okay.
A. You can Google any of these things. There's a plethora of information online.
Q. All right. Now - just about done here.
Mr. Kahn, have you ever seen a MERS financial statement - profit and loss statement for the entity of MERS?
A. No. Well, let me say that there have been some floating around the Internet but, just like this particular document, you can't give credibility

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to something that is floating around.
Q. Okay.
A. I have not been provided with an annual report of income and financials of the MERS Corp.
Q. And would that be helpful to you?
A. Not really.
Q. I guess only in the event the Court allowed Mr. Renshaw to present a punitive damages claim. At that time, it would be come relevant; yes?
A. I don't know the legal aspect, but I'm happy to respond as asked, if I can - you know, within the realm of my expertise.
Q. Yes. Now, one last question. I'm sorry to have kept you so long. I appreciate you being available for this extended period.
Now, I've asked you to be available to testify on July 11th, which would be the second day of Trial. And I understand that you are leaving with your family on an extended vacation that you've had planned for quite a long time, and you're leaving on June 18th or 19th, and you don't plan to return to Florida until, I believe it's the 9th of July. Have I recalled that accurately?
A. I think that those are the dates.

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Q. And that you would be available on the 11th, and we could actually - you could - as long as we're able to do the hookup on our end, you could testify from your home office; is that right?
A. Yes.
MR. STEELE: All right. That's all I have for you. Thanks, Mr. Kahn, very much.
Matt, anything else?
MR. McGEE: No, I don't think I have anything else. Thank you, Mr. Kahn.
THE WITNESS: I would like to read.
(Thereupon, the DEPOSITION was concluded at 5:15 p.m.)

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CERTIFICATE

The State Of Florida,)
County Of MIAMI-DADE.)

I, CATHERINE FITZPATRICK, FPR, CRI, Court Reporter and Notary Public in and for the State of Florida at large, do hereby certify that I was authorized to and did stenographically report the DEPOSITION of RICHARD M. KAHN; that a review of the transcript was requested; and that the foregoing pages, numbered from 1 to 206, inclusive, are a true and correct transcription of my stenographic notes of said DEPOSITION.

I further certify that said DEPOSITION was taken at the time and place hereinabove set forth and that the taking of said DEPOSITION was commenced and completed as hereinabove set out.

I further certify that I am not an attorney or counsel of any of the parties, nor am I a relative or employee of any attorney or counsel of party connected with the action, nor am I financially interested in the action.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter. Dated this 19th day of June, 2012.

_____

CATHERINE FITZPATRICK, FPR, CRI, Court Reporter

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Date: June 22, 2012 Assignment #: 15474-3
Attorney:
Deponent: Richard Kahn
Case: Renshaw Vs. Homecomings/MERS

DEPONENT: It has been requested that you read and sign your transcript. This transcript is to be read only by you. Please make any corrections necessary on the Correction Sheet ONLY. You are to sign the Correction Sheet where indicated.

After signing the Correction Sheet, do the following:

1. The ORIGINAL executed Correction Sheet needs to be returned to our corporation.
2. Forward a COPY of the executed Correction Sheet directly to the attorney(s) listed below. (The address(es) can be found on the Appearance Page of your deposition.)
3. Retain a copy for your records.

CC: Matthey McGee, Esquire
Jon Steele, Esquire

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CORRECTION SHEET

Deposition of: Richard Kahn Date: 06/12/12
Regarding: Renshaw Vs. Homecomings/MERS
Reporter: Catherine Fitzpatrick

_____

Please make all corrections, changes or clarifications to your testimony on this sheet, showing page and line number. If there are no changes, write "none" across the page. Sign this sheet on the line provided.

Page	Line	Reason for Change
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Signature_____
Richard Kahn

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DECLARATION

Deposition of: Richard Kahn Date: 06/12/12
Regarding: Renshaw Vs. Homecomings/MERS

_____

I declare under penalty of perjury the following to be true:

I have read my deposition and the same is true and accurate save and except for any corrections as made by me on the Correction Page herein.

Signed at _____, _____
on the _____ day of _____, 2012.

_____
Richard Kahn

Exhibit 37

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FPG-USA

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Mortgage Analysis as Part of a Credible Defense Against Foreclosure

Highly Qualified Experts www.fpg-usa.com ph: 786-329-5588 fax: 305-675-7676 info@fpg-usa.com

Renshaw v. MERS

Deposition Documents Requested

Date of Issuance	June 14, 2012
Borrower	Greg Renshaw
Property Address	3480 South Pimmit Place, Boise, ID 83706
Borrower's Attorney	Jon Steele, Attorney

You requested the following documents at the end of Richard Kahn deposition by MERS, atty McGee

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7. Information on LSI-LPS-Fidelity investigation.
8. Explanation of 4 HAMP waterfalls. What are they?
9. Example of HAMP worksheet
10. MERS Financial Statement or Annual Report.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Financial Practices
Bureau of Consumer Protection

Peggy L. Twohig
Associate Director

January 22, 2009

BY FAX AND FIRST-CLASS MAIL

Andrew L. Sandler, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

Re: Homecomings Financial, LLC

Dear Mr. Sandler:

As you know, the staff of the Division of Financial Practices of the Federal Trade Commission has conducted an investigation of Homecomings Financial, LLC ("Homecomings") for possible violations of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, and its implementing Regulation B, 12 C.F.R. § 202, and the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* The staff initiated this investigation after reviewing Homecomings' mortgage loan data reported pursuant to the Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801–2810, which indicated that African-American and Hispanic borrowers paid more for mortgage loans than non-Hispanic whites. The staff's investigation focused on whether the underwriting risk and the credit characteristics of the borrowers justified the reported disparities in loan price.

Homecomings originated the vast majority of its loans through independent brokers, and Homecomings' policy and practice was to set the risk-based price and other terms of its brokered loans. In addition, Homecomings' policy and practice was to allow brokers to assess discretionary charges on these loans, within certain limits set by Homecomings. These discretionary charges took the form of (1) fees charged at the time of origination, including broker points and fees, and (2) higher interest rates, in return for which Homecomings paid brokers yield spread premiums.

Based on an extensive investigation, which included obtaining and analyzing Homecomings' full and complete loan data, the staff's statistical analyses of the data show that, on average, Homecomings charged African-American and Hispanic borrowers substantially more for home purchase and refinance loans than similarly-situated non-Hispanic whites. The staff further determined that these disparities were caused by Homecomings' policy and practice of allowing its brokers broad discretion to determine the amount of discretionary fees charged to borrowers in addition to the risk-based price. The staff concluded that the disparities in these discretionary charges are substantial, statistically significant, and cannot be explained by any legitimate underwriting or credit characteristics in violation of the ECOA and the FTC Act.

During the course of this investigation, Homecomings ceased originating mortgage loans and stated it has no intention to resume mortgage lending in the future. In addition, Residential Capital LLC ("ResCap"), an indirect parent company of Homecomings, filed a 10-Q Quarterly Report for the third quarter 2008 for ResCap and its direct and indirect subsidiaries, including Homecomings (collectively, the "Company"), which states that the ability of the Company to continue as a going concern is in substantial doubt. The 10-Q further notes that the Company is heavily dependent on its own indirect parent, GMAC, LLC, for funding and capital support and that there can be no assurance that such support will continue. Because of these developments and based on additional information provided by the Company regarding its financial status, the staff has closed the investigation. However, the staff will continue to monitor future developments concerning Homecomings, including whether GMAC's recent conversion to a bank holding company [1] and its receipt of financial assistance from the U.S. Department of the Treasury,[2] may affect Homecomings' operating and financial status. If warranted by materially changed circumstances, the staff will take appropriate action, including the reopening of this investigation.

This action is not to be construed as a determination by the Commission that a violation of the ECOA, its implementing Regulation B, and the FTC Act did not occur, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public interest may require.

Sincerely,

Peggy L. Twohig
Associate Director
Division of Financial Practices

---

[1] On December 24, 2008, the Board of Governors of the Federal Reserve System approved GMAC's request to become a bank holding company. *See* GMAC LLC & IB Finance Holding Co., LLC, Order Approving Formation of Bank Holding Companies and Notice to Engage in Certain Nonbanking Activities, Fed. Reserve Sys. (Dec. 24, 2008), http://www.federalreserve.gov/newsevents/press/orders/orders20081224a1.pdf. GMAC's new status as a bank holding company does not affect the Commission's jurisdiction over Homecomings as a nonbank subsidiary.

[2] On December 29, 2008, the U.S. Treasury Department announced that it will purchase $5 billion in senior preferred equity from GMAC and will lend up to $1 billion to General Motors (GM) so that GM can contribute to GMAC's reorganization as a bank holding company. *See* Press Release, U.S. Dept. of the Treasury, Treasury Announces TARP Investment in GMAC, (Dec. 29, 2008), http://www.treas.gov/press/releases/hp1335.htm.

Freddie Mac Single Family / Single-Family Seller/Servicer Guide, Volume 1 / Chs. 16-21: Delivery / Chapter 16: Documentation Delivery / 16.4: Endorsement of Notes (02/26/10)

16.4: Endorsement of Notes (02/26/10)

(a) Without recourse

For each Mortgage delivered to Freddie Mac (except for Mortgages sold with recourse under the Guarantor or MultiLender Swap program, pursuant to Section 11.10(a) of this Guide), the original of the Note must be delivered pursuant to the requirements of this chapter; and the Note must bear the following endorsement signed by the Seller's duly authorized representative:

PAY TO THE ORDER OF _____

WITHOUT RECOURSE

(Name of Seller-endorser)

(Signature of duly authorized representative)

(Typed name and title of signatory)

This endorsement "without recourse" will in no way affect the Seller/Servicer's repurchase obligations under the Purchase Documents. If the Seller is a corporation, the person endorsing the Notes must be a duly authorized officer of the Seller. If the Seller is a partnership or other type of organization that is not a corporation, the person endorsing the Notes must be duly authorized by the Seller, in accordance with the organization's constituent documents and applicable law, to take such action on behalf of the Seller.Endorsement may not be made pursuant to a power of attorney.

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(c) Chain of endorsement

If the Seller is not the original payee on the Note, the chain of endorsements must be proper and complete from the original payee shown on the Note to the Seller. At the time the Mortgage is sold to Freddie Mac, the Seller must endorse the Note in blank, in accordance with (a) or (b) above. When a Transfer of Servicing occurs, the Transferor Servicer may not complete the blank endorsement or further endorse the Note.

(d) Facsimile signature

Notes may be endorsed by use of a facsimile signature stamp if the following conditions are met:

- The signature is that of a corporate officer of the Seller who has authority pursuant to a resolution of the Seller's Board of Directors
- The corporate officer whose signature is imprinted on the stamp authenticates his signature by affidavit which will be made available to Freddie Mac upon request
- Before the Delivery Date, the Seller must obtain an opinion of the Seller's counsel that the use of a facsimile signature constitutes a valid signature for an endorsement on each Note so endorsed. The Seller must furnish this opinion to Freddie Mac upon request.

(e) Use of an Allonge for the endorsement of a Note

Seller may use an Allonge to endorse a Note if the following conditions are met:

- The Allonge is permanently affixed to the Note
- The Allonge references the Borrower's name, the property address and the original principal balance of the Note
- The form of the Allonge, and its use, complies with all applicable laws
- The use of the Allonge does not impair Freddie Mac's status as a "holder in due course" or any of Freddie Mac's rights under the Purchase Documents

PCL XL Error

Subsystem:	I/O
Error:	InputReadError
Operator:	CloseSubPath
Position:	147499

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Renshaw v. MERS

Deposition Documents Requested

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Borrower	Greg Renshaw
Property Address	3480 South Pimmit Place, Boise, ID 83706
Borrower's Attorney	Jon Steele, Attorney

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UNITED STATES OF AMERICA
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Division of Financial Practices
Bureau of Consumer Protection

Peggy L. Twohig
Associate Director

January 22, 2009

BY FAX AND FIRST-CLASS MAIL

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1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

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Freddie Mac Single Family / Single-Family Seller/Servicer Guide, Volume 1 / Chs. 16-21: Delivery / Chapter 16: Documentation Delivery / 16.4: Endorsement of Notes (02/26/10)

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For each Mortgage sold with recourse under the Guarantor or MultiLender Swap program, the original of the Note must be delivered bearing the following endorsement signed by the Seller's duly authorized representative:

PAY TO THE ORDER OF _____

(Name of Seller-endorser)

(Signature of duly authorized representative)

(Typed name and title of signatory)

If the Seller is a corporation, the person endorsing the Notes must be a duly authorized officer of the Seller. If the Seller is a partnership or other type of organization that is not a corporation, the person endorsing the Notes must be duly authorized by the Seller, in accordance with the organization's constituent documents and applicable law, to take such action on behalf of the Seller.Endorsement may not be made pursuant to a power of attorney.

(c) Chain of endorsement

If the Seller is not the original payee on the Note, the chain of endorsements must be proper and complete from the original payee shown on the Note to the Seller. At the time the Mortgage is sold to Freddie Mac, the Seller must endorse the Note in blank, in accordance with (a) or (b) above. When a Transfer of Servicing occurs, the Transferor Servicer may not complete the blank endorsement or further endorse the Note.

(d) Facsimile signature

Notes may be endorsed by use of a facsimile signature stamp if the following conditions are met:

- The signature is that of a corporate officer of the Seller who has authority pursuant to a resolution of the Seller's Board of Directors
- The corporate officer whose signature is imprinted on the stamp authenticates his signature by affidavit which will be made available to Freddie Mac upon request
- Before the Delivery Date, the Seller must obtain an opinion of the Seller's counsel that the use of a facsimile signature constitutes a valid signature for an endorsement on each Note so endorsed. The Seller must furnish this opinion to Freddie Mac upon request.

(e) Use of an Allonge for the endorsement of a Note

Seller may use an Allonge to endorse a Note if the following conditions are met:

- The Allonge is permanently affixed to the Note
- The Allonge references the Borrower's name, the property address and the original principal balance of the Note
- The form of the Allonge, and its use, complies with all applicable laws
- The use of the Allonge does not impair Freddie Mac's status as a "holder in due course" or any of Freddie Mac's rights under the Purchase Documents

MERS®

Ohio Federal Court Opinions and Orders in Mortgage Foreclosure Actions

Recent decisions rendered by three Federal District Court Judges relating to mortgage foreclosure actions in Ohio have generated a lot of attention in the press and various newsletters. These decisions actually support the ability of Mortgage Electronic Registration Systems, Inc. (MERS) to foreclose on a mortgage loan when MERS is the mortgagee of record and holder of the promissory note. This is true even for loans that have been securitized with MERS as mortgagee. If the loans in the cases had been registered on the MERS® System with MERS as the mortgagee, and the plaintiffs had followed the MERS Membership Rules and Recommended Foreclosure Procedures, then the cases would not have been dismissed because MERS satisfies the conditions laid out by the judges in their decisions. As best we can tell, only one of the 14 loans involved in the Ohio cases that were dismissed was a MERS registered loan. The Plaintiff Trustee failed to obtain an assignment from MERS prior to initiating the foreclosure in violation of MERS policy.

In recent years certain ill-advised practices have been adopted in the default management process by some in the residential servicing community that were intended to expedite the foreclosure process - - e.g., the widespread use of lost note affidavits. It was these "short cuts" that were rejected by the judges in the Ohio cases, and none of the rejected procedures are part of the approved MERS procedures.

Two fundamental elements that must be pled at the commencement of any foreclosure action in order for the plaintiff to show that he or she has standing are (1) that the plaintiff is the holder[1] of the promissory note evidencing the indebtedness being collected and (2) that the plaintiff is the mortgagee of the mortgage that is being foreclosed, which secures the payment of the promissory note. The first problem addressed in the case was that copies of the promissory notes being presented to the court were not endorsed either to the Plaintiff or endorsed in blank so that the Plaintiff could prove that the plaintiff was the holder of the note. The other problem was that proper assignments of the mortgage to the Plaintiffs had not been prepared prior to the commencement of the foreclosure action, and as a result, the plaintiffs could not satisfy the second requirement.

The MERS Recommended Foreclosure Procedures[2] show how securitization trustees can avoid the problems involved in the Ohio cases. Under the MERS Membership Rules and Foreclosure Procedures, if MERS had been the mortgagee of any of the mortgage loans being foreclosed and the trustee chose to foreclose in the trustee's name, then the trustee is required to have obtained an assignment from MERS to the trustee prior to initiating the foreclosure action in the trustee's name. By following this MERS requirement, the trustee would have been protected from what

[1] Under the UCC, a plaintiff need only be the holder and not the "owner" of the promissory note.
[2] These procedures can be found on the MERS web site at www.mersinc.org.

happened in Ohio when Judge Boyko stated that "none of the Assignments show the named Plaintiff to be the owner of the rights, title and interest under the Mortgage at issue as of the date of the Foreclosure Complaint."

Alternatively, if MERS had been the mortgagee on any of the mortgage loans being foreclosed, the trustee could have chosen to bring the foreclosure in MERS' name. The MERS Membership Rules and Foreclosure Procedures require that the note be endorsed in blank and in the possession of a MERS officer or its foreclosure counsel. This results in MERS being the mortgagee of record as well as the note-holder. The MERS requirements address and protect against Judge Boyko's concern that in the 14 cases before him, the attached Note and Mortgage do not match the named Plaintiff.

In two Florida appellate court decisions rendered this year, *Mortgage Electronic Registration Systems, Inc. v. Oscar Revoredo,* 955 So.2d 33 and *Mortgage Electronic Registration Systems, Inc. v. George Azize*, 2007 WL 517842, which addressed challenges to the ability of MERS to foreclose a mortgage, appellate courts have ruled unanimously that MERS had standing to prosecute a foreclosure when MERS is the holder of the promissory note and the mortgagee. The laws in Florida about standing to foreclose are not different than the law being applied in the Ohio cases. If the loans in the Ohio cases had been MERS registered mortgage loans with MERS as the holder of the note and the mortgagee, and the plaintiffs had followed our procedures, the cases would not have been dismissed.

The Ohio decisions should not trouble MERS members. Instead, the opinions confirm the MERS business model and the benefits that MERS offers to the mortgage industry. When MERS is the mortgagee, MERS grounds title to the mortgage lien for the original lender and all of its successors and assignees, and thus does not require an assignment to be prepared and recorded when interests in the mortgage loan are transferred from one trading partner to another, including a securitization trustee. With the additional benefit of tracking the location of the promissory note, MERS can easily obtain the required status of being the note-holder. MERS meets the test put forth by the Ohio judges. By using the MERS® System and following the MERS Rules, MERS members can avoid the outcome that occurred in Ohio.

MERS written instructions case reference.

From Richard Kahn, Head Instructor of FPG-USA Academy.

For the purpose of forensic examination we expect to see written instructions from the Lender to MERS. We cannot of course cite or quote legal filings. That said, we may understand the object of our investigation by considering what on particular Maine Supreme Court Judge said revolving the issue that we are to investigate: This is a good example of understanding what we are looking for:

> From Maine Supreme Court Mauls MERS, HSBC, includes Vadney.
>
> While reviewing the case notes it became evident that an assignment executed Aug 24, 2009 was purported to have been made with MERS "as nominee" for "Calusa Investments"; signed by a Maria Vadney, V.P. of MERS. Vadney ALSO represented HSBC. I have tried to make it clear in prior writings, in this, and many instances, MERS is nominee for the Assignor, NOT the Assignee. "Calusa Investments" is the Assignor. HSBC is the Assignee. Vadney, although she may not recognize it, siging as V.P. or Assistant Secretary for MERS as nominee for "Calusa Investments" is signing on behalf of "Calusa Investments". **MERS, by its own stated rules, requires written direction by "Calusa Investments" directing them to convey a land title; or "Deed of Trust" to another entity** – in this case HSBC.
>
> **That is simply NOT possible.** "Calusa Investments" had their license was revoked in Sept of 2007. **Thus they could not have provided written instruction to MERS**; to Maria Vadney; or to HSBC to transfer titles to deeds they NO LONGER own! This is a direct and intentional fraud on the courts and on the party being foreclosed upon.

As an example of the MERS language requiring written instructions I attach

> MERS_ETA_Warehouse_Template_v5

As to transference of beneficial ownership rights:

In the most recent MERS Procedures Manual[1], made available on their website[2] I MERS clearly states they cannot transfer Beneficial Rights:

> *"Although the MERS® System tracks changes in ownership of the beneficial rights for loans registered on the MERS® System, the MERS® System cannot transfer the*

[1] Version 1.3 dated 09/06/2011

[2] http://www.mersinc.org/MersProducts/manuals.aspx?mpid=1 Procedures Manual page 70.

beneficial rights to the debt. The debt can only be transferred by properly endorsing the promissory note to the transferee"

My investigations into MERS reveals:

a. MERS was never conferred any economic benefit in the subject loan.
b. MERS has collected no money from the Borrower(s) under this Note.
c. MERS will not realize the value of Borrower(s) property sold through foreclosure of the Mortgage in the event the Note is not paid.
d. MERS has no financial interest in the Note.
e. MERS will suffer no injury if the Note is not paid.
f. MERS will realize no benefit if the Mortgage is foreclosed.
g. MERS does not satisfy requirements of constitutional standing.
h. MERS has never received, nor are they entitled to receive any payments from the borrower.
i. MERS does not enforce the security interest in the M/DOT for non-payment.

ELECTRONIC TRACKING AGREEMENT
WAREHOUSE LENDER

Lender Org ID _____
Borrower Org ID _____

THIS ELECTRONIC TRACKING AGREEMENT dated as of _____, 20__ (this "Agreement") among _____ ("Lender"), MERSCORP Holdings, Inc. ("Electronic Agent"), Mortgage Electronic Registration Systems, Inc. ("MERS") and _____ ("Borrower").

WHEREAS, the Lender has agreed to extend a line of credit to the Borrower for the purpose of the Borrower lending money to potential homeowners for mortgage loans (the "Mortgage Loans") pursuant to the terms and conditions of a Mortgage Warehouse Loan and Security Agreement dated as of _____ between the Lender and Borrower, as amended from time to time (the "_____ Agreement").

WHEREAS, the Borrower is obligated to pledge the Mortgage Loans to the Lender and also to service the Mortgage Loans pursuant to the terms and conditions of the _____ Agreement and to complete all actions necessary to cause the issuance and delivery to the Lender of the Mortgage Notes (the "Mortgage Notes"), and

WHEREAS, the Lender and the Borrower desire to have certain Mortgage Loans registered on the MERS® System (defined below) such that the mortgagee of record under each Mortgage (defined below) shall be identified as MERS;

NOW, THEREFORE, the parties, intending to be legally bound, agree as follows:

1. Definitions.

Capitalized terms used in this Agreement shall have the meanings ascribed to them below.

"Affected Loans" shall have the meaning assigned to such term in Section 4(b).

"Assignment of Mortgage" shall mean, with respect to any Mortgage, an assignment of the Mortgage, notice of transfer or equivalent instrument in recordable form, sufficient under the laws of the jurisdiction wherein the related mortgaged property is located to effect the assignment of the Mortgage upon recordation.

"Event of Default" shall mean a default that is not cured within the applicable grace period as defined in the _____ Agreement.

"MERS Procedures Manual" shall mean the MERS Procedures Manual attached as Exhibit B hereto, as it may be amended from time to time.

"MERS Designated Mortgage Loan" shall have the meaning assigned to such term in Section 3.

"MERS® System" shall mean the Electronic Agent's mortgage electronic registry system, as more particularly described in the MERS Procedures Manual.

"Mortgage" shall mean a lien, mortgage or deed of trust securing a Mortgage Note.

"Mortgage Loan" shall mean each mortgage loan that is pledged by Borrower to Lender.

"Mortgage Loan Documents" shall mean the originals of the Mortgage Notes and other documents and instruments.

"Mortgage Note" shall mean a promissory note or other evidence of indebtedness of the obligor thereunder, representing a Mortgage Loan, and secured by the related Mortgage.

"Mortgagor" shall mean the obligor on a Mortgage Note.

"Notice of Default" shall mean a notice from the Lender that an Event of Default has occurred and is continuing.

"Opinion of Counsel" shall mean a written opinion of counsel in form and substance reasonably acceptable to the Lender.

"Person" shall mean any individual, corporation, company, voluntary association, partnership, joint venture, limited liability company, trust, unincorporated association or government (or any agency, instrumentality or political subdivision thereof).

2. Appointment of the Electronic Agent.

(a) The Lender and the Borrower, by execution and delivery of this Agreement, each does hereby appoint MERSCORP Holdings, Inc. as the Electronic Agent, subject to the terms of this Agreement, to perform the obligations set forth herein.

(b) MERSCORP Holdings, Inc., by execution and delivery of this Agreement, does hereby (i) agree with the Lender and the Borrower subject to the terms of this Agreement to perform the services set forth herein, and (ii) accepts its appointment as the Electronic Agent.

3. Designation of MERS as Mortgagee of Record; Designation of Investor and Servicer of Record in MERS.

The Borrower represents and warrants that (a) it has designated or shall designate MERS as, and has taken or will take such action as is necessary to cause MERS to be, the mortgagee of record, as nominee for the Borrower, with respect to the pledged Mortgage Loans in accordance with the MERS Procedures Manual and (b) it has designated or will **promptly** designate itself as the servicer or subservicer in the MERS® System for each such pledged Mortgage Loan (each

pledged Mortgage Loan, so designated is a "MERS Designated Mortgage Loan"), and has designated or will promptly designate the Lender as the interim funder on the MERS® System with respect to each MERS Designated Mortgage Loan.

4. Obligations of the Electronic Agent

(a) The Electronic Agent shall ensure that MERS, as the mortgagee of record under each MERS Designated Mortgage Loan, shall promptly forward all properly identified notices MERS receives in such capacity to the person or persons identified in the MERS® System as the servicer or if a subservicer is identified in the MERS® System, the subservicer for such MERS Designated Mortgage Loan.

(b) Upon receipt of a Notice of Default, in the form of Exhibit C, from the Lender in which the Lender shall identify the MERS Designated Mortgage Loans with respect to which the Borrower's right to act as servicer or subservicer thereof has been terminated by the Lender (the "Affected Loans"), the Electronic Agent shall modify the investor fields and/or servicer fields to reflect the investor and/or servicer on the MERS® System as the Lender or the Lender's designee with respect to such Affected Loans. Following such Notice of Default, the Electronic Agent shall follow the instructions of the Lender with respect to the Affected Loans without further consent of the Borrower, and shall deliver to the Lender any documents and/or information (to the extent such documents or information are in the possession or control of the Electronic Agent) with respect to the Affected Loans requested by the Lender.

(c) Upon the Lender's request and instructions, and at the Borrower's sole cost and expense, the Electronic Agent shall deliver to the Lender or the Lender's designee, an Assignment of Mortgage from MERS, in blank, in recordable form but unrecorded with respect to each Affected Loan; provided however, that the Electronic Agent shall not be required to comply with the foregoing unless the costs of doing so shall be paid by the Borrower or a third party.

(d) The Electronic Agent shall promptly notify the Lender if it has actual knowledge that any mortgage, pledge, lien, security interest or other charge or encumbrance exists with respect to any of the Mortgage Loans. Upon the reasonable request of the Lender, the Electronic Agent shall review the field designated "interim funder" and shall notify the Lender if any Person (other than the Lender) is identified in the field designated "interim funder".

(e) In the event that (i) the Borrower, the Electronic Agent or MERS shall be served by a third party with any type of levy, attachment, writ or court order with respect to any MERS Designated Mortgage Loan or (ii) a third party shall institute any court proceeding by which any MERS Designated Mortgage Loan shall be required to be delivered otherwise than in accordance with the provisions of this Agreement, the Electronic Agent shall promptly deliver or cause to be delivered to the other parties to this Agreement copies of all court papers, orders, documents and other materials concerning such proceedings.

(f) Upon the request of the Lender, the Electronic Agent shall run a query with respect to any and all specified fields with respect to any or all of the MERS Designated

Mortgage Loans and, if requested by the Lender, shall change the information in such fields in accordance with the Lender's instructions.

(g) MERS, as mortgagee of record for the MERS Designated Mortgage Loans, shall take all such actions as may be required by a mortgagee in connection with servicing the MERS Designated Mortgage Loans at the request of the applicable servicer identified on the MERS® System, including, but not limited to, executing and/or recording, any modification, waiver, subordination agreement, instrument of satisfaction or cancellation, partial or full release, discharge or any other comparable instruments, at the sole cost and expense of the Borrower.

(h) MERS may cause certain officers of the Lender to be appointed officers of MERS, with authority to wield all of the powers specified in the corporate resolution of MERS, with respect to the MERS Designated Mortgage Loans. The corporate resolution may be modified, amended, replaced, or revoked, and any authorizations and powers specified therein may be subject to change.

5. Access to Information.

Upon the Lender's request, the Electronic Agent shall furnish the Lender or its auditors information in its possession with respect to the MERS Designated Mortgage Loans and shall permit them to inspect the Electronic Agent's and MERS' records relating to the MERS Designated Mortgage Loans at all reasonable times during regular business hours.

6. Representations of the Electronic Agent and MERS.

The Electronic Agent and MERS hereby represent and warrant as of the date hereof that:

(a) each of the Electronic Agent and MERS has the corporate power and authority and the legal right to execute and deliver, and to perform its obligations under this Agreement, and has taken all necessary corporate action to authorize its execution, delivery and performance of this Agreement;

(b) no consent or authorization of, filing with, or other act by or in respect of, any arbitrator or governmental authority and no consent of any other Person is required in connection with the execution, delivery, performance, validity or enforceability of this Agreement;

(c) this Agreement has been duly executed and delivered on behalf of the Electronic Agent and MERS and constitutes a legal, valid and binding obligation of the Electronic Agent and MERS enforceable in accordance with its terms, except as enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally and by general principles of equity (whether enforcement is sought in proceedings in equity or at law);

(d) the Electronic Agent and MERS will maintain at all times insurance policies for fidelity and errors and omissions in amounts of at least three million dollars ($3,000,000) and five million dollars ($5,000,000) respectively, and a certificate and policy of the insurer shall be

furnished to the Lender upon request and shall contain a statement of the insurer that such insurance will not be terminated prior to 30 days' written notice to the Lender.

7. Covenants of MERS.

MERS shall (a) not incur any indebtedness other than in the ordinary course of its business, (b) not engage in any dissolution, liquidation, consolidation, merger or sale of assets, (c) not engage in any business activity in which it is not currently engaged, (d) not take any action that might cause MERS to become insolvent, (e) not form, or cause to be formed, any subsidiaries, (f) maintain books and records separate from any other person or entity, (g) maintain its bank accounts separate from any other person or entity, (h) not commingle its assets with those of any other person or entity and hold all of its assets in its own name, (i) conduct its own business in its own name, (j) pay its own liabilities and expenses only out of its own funds, (k) observe all corporate formalities, (l) enter into transactions with affiliates only if each such transaction is intrinsically fair, commercially reasonable, and on the same terms as would be available in an arm's length transaction with a person or entity that is not an affiliate, (m) pay the salaries of its own employees from its own funds, (n) maintain a sufficient number of employees in light of its contemplated business operations, (o) not guarantee or become obligated for the debts of any other entity or person, (p) not hold out its credit as being available to satisfy the obligation of any other person or entity, (q) not acquire the obligations or securities of its affiliates or owners, including partners, members or shareholders, as appropriate, (r) not make loans to any other person or entity or buy or hold evidence of indebtedness issued by any other person or entity (except for cash and investment-grade securities), (s) allocate fairly and reasonably any overhead expenses that are shared with an affiliate, including paying for office space and services performed by any employee of any affiliate, (t) use separate stationery, invoices, and checks bearing its own name, (u) not pledge its assets for the benefit of any other person or entity, (v) hold itself out as a separate identity, (w) correct any known misunderstanding regarding its separate identity, (x) not identify itself as a division of any other person or entity, and (y) maintain adequate capital in light of its contemplated business operations.

MERS agrees that in no event shall MERS' status as mortgagee of record with respect to any MERS Designated Mortgage Loan confer upon MERS any rights or obligations as an owner of any MERS Designated Mortgage Loan or the servicing rights related thereto, and MERS will not exercise such rights unless directed to do so by the Lender.

8. Covenants of Borrower.

(a) The Borrower covenants and agrees with the Lender that with respect to each MERS Designated Mortgage Loan, it will not identify any party except the Lender in the field "interim funder" on the MERS® System.

(b) Borrower will provide the Lender with a Mortgage Identification Number ("MIN") for each MERS Designated Mortgage Loan that the Lender has extended credit on for which MERS is the mortgagee of record.

9. No Adverse Interest of the Electronic Agent or MERS.

By execution of this Agreement, the Electronic Agent and MERS each represents and warrants that it currently holds, and during the existence of this Agreement shall hold, no adverse interest, by way of security or otherwise, in any MERS Designated Mortgage Loan. The MERS Designated Mortgage Loans shall not be subject to any security interest, lien or right to set-off by the Electronic Agent, MERS, or any third party claiming through the Electronic Agent or MERS, and neither the Electronic Agent nor MERS shall pledge, encumber, hypothecate, transfer, dispose of, or otherwise grant any third party interest in, the MERS Designated Mortgage Loans.

10. Indemnification of the Lender.

The Electronic Agent agrees to indemnify and hold the Lender and its designees harmless against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements, including reasonable attorneys' fees, that the Lender may sustain arising out of any breach by the Electronic Agent of this Agreement, the Electronic Agent's negligence, bad faith or willful misconduct, its failure to comply with the Lender's instructions hereunder or to the extent caused by delays or failures arising out of the inability of the Lender or the Electronic Agent to access information on the MERS® System. The foregoing indemnification shall survive any termination or assignment of this Agreement.

11. Reliance of the Electronic Agent.

(a) In the absence of bad faith on the part of the Electronic Agent, the Electronic Agent may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon any request, instruction, certificate or other document furnished to the Electronic Agent, reasonably believed by the Electronic Agent to be genuine and to have been signed or presented by the proper party or parties and conforming to the requirements of this Agreement.

(b) Notwithstanding any contrary information which may be delivered to the Electronic Agent by the Borrower, the Electronic Agent may conclusively rely on any information or Notice of Default delivered by the Lender, and the Borrower shall indemnify and hold the Electronic Agent harmless for any and all claims asserted against it for any actions taken in good faith by the Electronic Agent in connection with the delivery of such information or Notice of Default.

12. Fees.

It is understood that the Electronic Agent or its successor will charge such fees and expenses for its services hereunder as set forth in a separate agreement between the Electronic Agent and the Borrower. The Electronic Agent shall give prompt written notice of any disciplinary action instituted with respect to the Borrower's failure to pay any fees required in connection with its use of the MERS® System, and will give written notice at least thirty (30) days prior to any revocation of the Borrower's membership in the MERS® System.

13. Resignation of the Electronic Agent; Termination.

(a) The Lender has entered into this Agreement with the Electronic Agent and MERS in reliance upon the independent status of the Electronic Agent and MERS, and the representations as to the adequacy of their facilities, personnel, records and procedures, its integrity, reputation and financial standing, and the continuance thereof. Neither the Electronic Agent nor MERS shall assign this Agreement or the responsibilities hereunder or delegate their rights or duties hereunder (except as expressly disclosed in writing to, and approved by, the Lender) or any portion hereof or sell or otherwise dispose of all or substantially all of its property or assets without providing the Lender with at least 60 days' prior written notice thereof.

(b) Neither the Electronic Agent nor MERS shall resign from the obligations and duties hereby imposed on them except by mutual consent of the Electronic Agent, MERS and the Lender, or upon the determination that the duties of the Electronic Agent and MERS hereunder are no longer permissible under applicable law and such incapacity cannot be cured by the Electronic Agent and MERS. Any such determination permitting the resignation of the Electronic Agent and MERS shall be evidenced by an Opinion of Counsel to such effect delivered to the Lender which Opinion of Counsel shall be in form and substance acceptable to the Lender. No such resignation shall become effective until the Electronic Agent and MERS have delivered to the Lender all of the Assignments of Mortgage, in blank, in recordable form but unrecorded for each MERS Designated Mortgage Loan identified by the Lender as collateralized by the Lender.

14. Removal of the Electronic Agent.

(a) The Lender, with or without cause, may remove and discharge the Electronic Agent and MERS from the performance of its duties under this Agreement with respect to some or all of the MERS Designated Mortgage Loans by written notice from the Lender to the Electronic Agent and the Borrower.

(b) In the event of termination of this Agreement, at the Borrower's sole cost and expense, the Electronic Agent shall follow the instructions of the Lender for the disposition of the documents in its possession pursuant to this Agreement, and deliver to the Lender an Assignment of Mortgage, in blank, in recordable form but unrecorded for each MERS Designated Mortgage Loan identified by the Lender as collateralized by the Lender. Notwithstanding the foregoing, in the event that the Lender terminates this Agreement with

respect to some, but not all, of the MERS Designated Mortgage Loans, this Agreement shall remain in full force and effect with respect to any MERS Designated Mortgage Loans for which this Agreement is not terminated hereunder. Notwithstanding any termination of this Agreement, the provisions of Section 10 shall survive any termination.

15. Notices.

All written communications hereunder shall be delivered, via facsimile or by overnight courier, to the Electronic Agent and/or the Lender and/or the Borrower as indicated on the signature page hereto, or at such other address as designated by such party in a written notice to the other parties. All such communications shall be deemed to have been duly given when transmitted by facsimile, or in the case of a mailed notice, upon receipt, in each case given or addressed as aforesaid.

16. Term of Agreement.

(a) This Agreement shall continue to be in effect until terminated by either the Lender or the Electronic Agent sending written notice to the other parties of this Agreement at least thirty (30) days prior to said termination.

(b) Upon the termination of this Agreement by the Electronic Agent, the Electronic Agent shall, at the Electronic Agent's sole cost and expense, execute and deliver to the Lender or its designee an Assignment of Mortgage with respect to each MERS Designated Mortgage Loan identified by the Lender, in blank, in recordable form but unrecorded. In the event that this Agreement is terminated by the Lender, the duties of the Electronic Agent in the preceding sentence shall be at the sole cost and expense of the Borrower. In addition, the Lender and the Electronic Agent may, at the sole option of the Lender, enter into a separate agreement which shall be mutually acceptable to the parties with respect to any or all of the MERS Designated Mortgage Loans with respect to which this Agreement is terminated.

17. Authorizations.

Any of the persons whose signatures and titles appear on Exhibit A hereto are authorized, acting singly, to act for the Lender, the Borrower or the Electronic Agent, as the case may be, under this Agreement. The parties may change the information on Exhibit A hereto from time to time but each of the parties shall be entitled to rely conclusively on the then current exhibit until receipt of a superseding exhibit.

18. Amendments.

This Agreement may be amended from time to time only by written agreement of the Lender, the Borrower and the Electronic Agent.

19. **Severability**.

If any provision of this Agreement is declared invalid by any court of competent jurisdiction, such invalidity shall not affect any other provision, and this Agreement shall be enforced to the fullest extent required by law.

20. **Binding Effect**.

This Agreement shall be binding and inure to the benefit of the parties hereto and their respective successors and assigns.

21. **Governing Law**.

THIS AGREEMENT SHALL BE CONSTRUED IN ACCORDANCE WITH, AND GOVERNED BY THE LAW OF THE COMMONWEALTH OF VIRGINIA.

THE LENDER, THE BORROWER, THE ELECTRONIC AGENT AND MERS EACH IRREVOCABLY AGREES THAT ANY ACTION OR PROCEEDING ARISING OUT OF OR IN ANY MANNER RELATING TO THIS AGREEMENT MAY BE BROUGHT IN ANY COURT OF THE COMMONWEALTH OF VIRGINIA, OR IN THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AND BY THE EXECUTION AND DELIVERY OF THIS AGREEMENT EXPRESSLY AND IRREVOCABLY ASSENT AND SUBMIT TO THE NONEXCLUSIVE JURISDICTION OF ANY SUCH COURTS IN ANY SUCH ACTION OR PROCEEDING.

22. **Waiver of Jury Trial**.

THE LENDER, THE BORROWER, THE ELECTRONIC AGENT AND MERS EACH IRREVOCABLY AGREES TO WAIVE ITS RIGHT TO A JURY TRIAL IN ANY ACTION OR PROCEEDING AGAINST IT ARISING OUT OF, OR RELATED IN ANY MANNER TO, THIS AGREEMENT OR ANY RELATED AGREEMENT.

23. **Execution**.

This Agreement may be executed in one or more counterparts and by the different parties hereto on separate counterparts, each of which, when so executed, shall be deemed to be an original; such counterparts, together, shall constitute one and the same agreement.

24. **Cumulative Rights**.

The rights, powers and remedies of the Electronic Agent, MERS, the Borrower and the Lender under this Agreement shall be in addition to all rights, powers and remedies given to the Electronic Agent, MERS, the Borrower and the Lender by virtue of any statute or rule of law, or

any other agreement, all of which rights, powers and remedies shall be cumulative and may be exercised successively or concurrently without impairing the Lender's rights in the Mortgage Loans.

25. Status of Electronic Agent.

Nothing herein contained shall be deemed or construed to create a partnership, joint venture between the parties hereto and the services of the Electronic Agent and MERS shall be rendered as independent contractors for the Lender and the Borrower. Other than the obligations of the Electronic Agent and MERS expressly set forth herein, the Electronic Agent and MERS shall have no power or authority to act as agent for the Lender or the Borrower pursuant to any grant of authority made under or pursuant to this Agreement.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Lender, the Borrower, the Electronic Agent and MERS have duly executed this Agreement as of the date first above written.

_____,
as Borrower

By:_____

Name:
Title:

Address for Notices:

_____

_____

Attention:_____
Telecopier No.: _____
Telephone No.: _____

_____,
as Lender

By:_____
Name:
Title:

Address for Notices:

_____

_____

Attention:_____
Telecopier No.: _____
Telephone No.: _____

[ELECTRONIC AGENT AND MERS SIGNATURE PAGE TO
ELECTRONIC TRACKING AGREEMENT]

ELECTRONIC AGENT:

MERSCORP HOLDINGS, INC.

By: _____
Name: Daniel R. McLaughlin
Title: Executive Vice President

Address for Notices:

MERSCORP Holdings, Inc.
1818 Library Street, Suite 300
Reston, VA 20190
Attention: Sharon McGann Horstkamp, Esq.
Telephone No.: (703) 761-1270
Facsimile No.: (703) 748-0183

MERS:

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

By: _____
Name: Sharon McGann Horstkamp
Title: Corporate Secretary

Address for Notices:

Mortgage Electronic Registration Systems, Inc.
1818 Library Street, Suite 300
Reston, VA 20190
Attention: Sharon McGann Horstkamp, Esq.
Telephone No.: (703) 761-1270
Facsimile No.: (703) 748-0183

EXHIBIT A

LIST OF AUTHORIZED PERSONS

LENDER AUTHORIZATIONS:

Any of the persons whose signatures and titles appear below, or attached hereto, are authorized, acting singly, to act for the Lender under this Agreement:

By:_____	By:_____	By:_____
Name: _____	Name: _____	Name: _____
Title: _____	Title: _____	Title: _____

BORROWER AUTHORIZATIONS:

Any of the persons whose signatures and titles appear below, or attached hereto, are authorized, acting singly, to act for the Borrower under this Agreement:

By:_____	By:_____	By:_____
Name: _____	Name: _____	Name: _____
Title: _____	Title: _____	Title: _____

EXHIBIT A CONTINUED

LIST OF AUTHORIZED PERSONS

ELECTRONIC AGENT AUTHORIZATIONS:

Any of the persons whose signatures and titles appear below, or attached hereto, are authorized, acting singly, to act for the Electronic Agent under this Agreement:

By: _____
Daniel R. McLaughlin
Executive Vice President

By: _____
Sharon McGann Horstkamp
Vice President

MERS AUTHORIZATIONS:

Any of the persons whose signatures and titles appear below, or attached hereto, are authorized, acting singly, to act for MERS under this Agreement:

By: _____
Sharon McGann Horstkamp
Corporate Secretary

By: _____
Name: _____
Title: _____

EXHIBIT B

MERS PROCEDURES MANUAL

Shall be found on the MERS website at: http://www.mersinc.org

EXHIBIT C

NOTICE OF DEFAULT

_____ ___, ____

Attention: Sharon M. Horstkamp
MERSCORP Holdings, Inc.
1818 Library Street, Suite 300
Reston, Virginia 20190

Ladies and Gentlemen:

Please be advised that this Notice of Default is being issued pursuant to Section 4(b) of that certain Electronic Tracking Agreement (the "Electronic Tracking Agreement"), dated as of _____, 200_, by and among _____(the "Lender"), the _____ (the "Borrower"), MERSCORP Holdings, Inc. (the "Electronic Agent") and Mortgage Electronic Registration Systems, Inc. ("MERS"). The Affected Loans are listed on the attached Schedule 1 (including the mortgage identification numbers). Accordingly, the Electronic Agent shall not accept instructions from the Borrower, the Servicer, any subservicer and from no party other than the Lender with respect to such Mortgage Loans, until otherwise notified by the Lender.

Any terms used herein and not otherwise defined shall have such meaning specified in the Electronic Tracking Agreement.

By:_____
Title: _____

Freddie Mac Single Family / Document Custody Procedures Handbook / Chapter 4: Document Release Procedures / Table of Contents (03/12)

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Title: Eligibility (03/12) Copy To Clipboard
Document ID: df590db0-6157-46dd-91d9-113e8721a847 Copy To Clipboard
Document Name: 003680392@ch-1!n1-c Copy To Clipboard

Eligibility (03/12)

The Document Custodian eligibility requirements appear in Section 18.2 of the Guide. An institution must meet the requirements found within Section 18.2 for Freddie Mac to approve it as a Document Custodian including, but not limited to, being a financial institution that is supervised and regulated; meeting Freddie Mac's Minimum Acceptable Net Worth requirement or investment grade rating as defined in Guide Section 18.2; and performing the document custody function in a trust department that is established and operated under trust powers granted by the Document Custodian's primary regulator.

18.2: Document Custodian eligibility (03/15/12)

(a)General requirements The Seller/Servicer must choose a Document Custodian that will:

- Enter into a custodial agreement with the Seller/Servicer and Freddie Mac (see Section 18.3)
- Meet and maintain all applicable eligibility requirements of this section
- Comply with:
  - All Guide requirements pertaining to Notes and assignments held for Freddie Mac, including but not limited to, Chapters 16 through 18, Sections 22.13 and 56.9 and other requirements for Notes, assignments and related loan documents, as amended from time-to-time. If the requirements are amended in the Guide, then the custodial agreement will be deemed amended to the extent necessary to conform with such amended Guide requirements.
  - All terms of the custodial agreement
  - Any other requirements which Freddie Mac may choose to specify in order to ensure the safety and security or enforceability of the Notes and assignments held by the Document Custodian
  - Such standards, including custodial performance, and such fiduciary responsibilities as may be prescribed by Freddie Mac, in its discretion, from time-to-time
- Notify Freddie Mac and the Seller/Servicer if, at any time, it fails to meet any applicable eligibility requirement

(b)Basic eligibility requirements An eligible Document Custodian must:

1. Be one of the following types of institutions:
   - A financial institution that is supervised and regulated by the Federal Deposit Insurance Corporation (FDIC), Board of Governors of the Federal Reserve System, or the Office of the Comptroller of the Currency (OCC), or
   - A subsidiary of a supervised and regulated financial institution listed above, authorized to perform trust services under applicable law, or
   - A Federal Home Loan Bank chartered pursuant to the Federal Home Loan Bank Act
2. Not be in receivership, conservatorship or liquidation and have no federally-regulated parent that is in receivership, conservatorship or liquidation

3.The following must have an investment-grade rating by a nationally recognized statistical rating organization or have an Acceptable Net Worth of at least $500,000,000:

- Entities applying to be Document Custodians, and
- Document Custodians with existing custodial relationships or entering into new custodial relationships with Freddie Mac Seller/Servicers

4.Be equipped with secure, fire-resistant storage facilities with adequate controls on access to ensure the safety and security of the Notes and assignments in its custody. For eligible Document Custodians and for entities applying to be a Document Custodian, the vault must provide a minimum of two hours fire protection. If a Document Custodian's regulator requires a higher standard of fire protection, then that higher standard shall apply.

5.Maintain the Note and assignments in such a manner as to ensure security and confidentiality and prohibit unauthorized access to or use of information contained in the Notes and assignments

6.Use employees who are knowledgeable in the handling of Notes and assignments and of the functions and duties of a Document Custodian as required by Freddie Mac, including access to and use of the Freddie Mac Selling System. (See Section A1.12 for information on obtaining Selling System access and user roles.)

7.Access the electronic version of the *Single-Family Seller/Servicer Guide* (Guide) through the link on **http://www.freddiemac.com/singlefamily/** or arrange for a current subscription to the electronic Guide via AllRegs®

8.Maintain the following insurance coverages, at a minimum:

- Financial institution bond, or equivalent insurance, covering any loss resulting from:
  - Employee dishonesty
  - Physical damage or destruction to, or loss of, any Notes and assignments while such documents are located on the Document Custodian's premises
  - Physical damage or destruction to, or loss of, any Notes and assignments while such documents are in transit between the Document Custodian's premises and anywhere, regardless of the means by which they are transported, if the Document Custodian has contractually agreed with the Seller/Servicer to assume liability for Notes and assignments while in transit
- If the Document Custodian has not contractually agreed with the Seller/Servicer to assume liability for the Notes and assignments while in transit, the Seller/Servicer must obtain insurance as described in Section 18.4(c)
- Errors and omissions insurance covering claims resulting from the Document Custodian's breach of duty, neglect, errors or omissions, misstatement, misleading statement or other wrongful acts committed in the conduct of document custodial services

For the purpose of these insurance coverages, the Notes are to be defined as "Negotiable Instruments" per Section 3-104 of the Uniform Commercial Code (UCC).

Freddie Mac's insurance requirements as stated in this subsection do not diminish, restrict or otherwise limit the Document Custodian's responsibilities and obligations as stated in any Form 1035.

The required insurance coverages must:

- Be underwritten by an insurer that has an A- (A minus) or better rating according to the A.M. Best Company
- Be maintained in amounts that are deemed adequate for the number of Notes held in custody and that are deemed appropriate based on prudent business practice

- Each have a deductible amount no more than the greater of 5% of the Document Custodian's generally accepted accounting principles (GAAP) net worth or $100,000, but in no case greater than $10,000,000

In the event that a Document Custodian is covered under its parent's insurance program rather than maintaining its own insurance:

- The acceptable deductible amount for each insurance coverage may be no more than the greater of 5% of the parent's GAAP net worth or $100,000, but in no case greater than $10,000,000
- The Document Custodian must be a named insured
- The parent's insurance policy(ies) must meet the Document Custodian insurance requirements as stated in this section

In the event of cancellation or non-renewal of any of the required insurance coverages, the Document Custodian or its insurer, insurance broker or agent must provide the Seller/Servicer and Freddie Mac's Counterparty Credit Risk Management Department **(see Directory 1)** 30 days advance written notice thereof.

9.Have and maintain a document tracking and reporting system that, at minimum:

- Provides, in an electronic format acceptable to Freddie Mac, an accounting of all Notes held for Freddie Mac identified by Freddie Mac loan number and the Servicer's six-digit Seller/Servicer number
- Monitors the receipt of Notes and assignments, including related documentation (for example, modifying instruments or powers of attorney)
- Monitors the release of Notes and assignments requested by the Servicer
- Tracks the physical location of the Note and related documents
- Cross references the Freddie Mac loan number for each Mortgage with the loan number assigned by the Servicer
- Accurately accounts for documents transferred or released

The Document Custodian must provide screen prints of its document tracking system to Freddie Mac together with its request for initial approval, and thereafter, annually as part of its eligibility certification, and otherwise, upon request.

10.Have and maintain a disaster recovery plan that documents, at a minimum:

- The process by which the physical recovery/restoration of documents will occur
- The recovery of tracking system data, including any electronically maintained information
- The relocation/restoration of the facilities to ensure continuing ability to perform required custodial functions
- Provisions for the testing and maintenance of the plan
- A provision to notify Freddie Mac **(see Directory 9)** of a disaster within 24 hours of the disaster according to the requirement in Section 18.6(d)

11.Have and implement written procedures that ensure compliance with Freddie Mac requirements and prudent practices in performing the duties of a Document Custodian with respect to the Notes and associated documents, including, at minimum:

- Certification and maintenance
- Release and transfer
- Access
- Tracking and reporting

(c)Eligibility requirements for the Seller/Servicer acting as its own Document Custodian Subject to Freddie Mac's approval and in Freddie Mac's sole discretion, the

Seller/Servicer may act as its own Document Custodian if it satisfies all requirements in Sections 18.2(a) and 18.2(b) and if the Notes and assignments for Mortgages serviced for Freddie Mac in its custody are entrusted to a department that:

1.Is established and operated under trust powers granted by the Seller/Servicer's primary regulator

2.Has custodial officers who are duly authorized to act on behalf of the Document Custodian in its trust capacity and empowered to enter into a custodial agreement with the Seller/Servicer and Freddie Mac

3.Is subject to periodic review, examination and inspection by the regulator granting trust powers

4.Is independently and separately managed from any functional area that performs Mortgage origination, selling or servicing

5.Maintains separate records, files and operations

6.Uses personnel not engaged in the functions of Mortgage origination, selling or servicing to perform the custodial function

(d)Eligibility requirements for a third-party Document Custodian that is not an affiliate of the Seller/Servicer An institution that is not an affiliate of the Seller/Servicer may act as a Document Custodian if:

- It satisfies all requirements in Sections 18.2(a) and 18.2(b)
- Within the institution, the document custodial function:
  - Is independently and separately managed from any functional area that performs Mortgage origination, selling or servicing
  - Maintains separate records, files and operations
  - Is performed by personnel not engaged in the functions of Mortgage origination, selling or servicing

(e)Eligibility requirements for a third-party Document Custodian that is an affiliate of the Seller/Servicer Subject to Freddie Mac's approval and in Freddie Mac's sole discretion, a third-party that is an affiliate of the Seller/Servicer may act as a Document Custodian if:

- It meets all the requirements in Sections 18.2(a) and 18.2(b)
- It is independently and separately managed from the Seller/Servicer. The third-party Document Custodian may occupy the same premises as the Seller/Servicer, as long as the Seller/Servicer is not involved in the management or operations of the third-party custodian.
- Within the institution, the document custodial function:
  - Is independently and separately managed from any functional area that performs Mortgage origination, selling or servicing
  - Maintains separate records, files and operations
  - Is performed by personnel not engaged in the functions of Mortgage origination, selling or servicing

(f)Additional eligibility requirements for a Document Custodian that is an affiliate of a warehouse lender Freddie Mac recognizes that there may be instances where, for operational efficiency, the document custodial function shares personnel with the institution's warehouse lending function. This sharing of personnel will be allowed only when the document custodial function has:

- A separate tracking and reporting system that provides a clear distinction between Freddie Mac's assets and the collateral held for the warehouse lender
- Separate record keeping from other functional areas, including warehouse lending
- Operating controls that provide a clear distinction between:

- Activities that an employee performs for the benefit of the warehouse lender and activities performed for Freddie Mac
- Management decisions that apply to collateral held as security for the warehouse line and those that apply to Notes that are held in trust for the sole benefit of Freddie Mac

Close

You are viewing: Endorsements (03/12)

Document Custody Procedures Handbook
Chapter 3: Document Delivery and Processing Procedures
Endorsements (03/12)

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Financial Practices
Bureau of Consumer Protection

Peggy L. Twohig
Associate Director

January 22, 2009

BY FAX AND FIRST-CLASS MAIL

Andrew L. Sandler, Esq.
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

Re: Homecomings Financial, LLC

Dear Mr. Sandler:

As you know, the staff of the Division of Financial Practices of the Federal Trade Commission has conducted an investigation of Homecomings Financial, LLC ("Homecomings") for possible violations of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, and its implementing Regulation B, 12 C.F.R. § 202, and the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* The staff initiated this investigation after reviewing Homecomings' mortgage loan data reported pursuant to the Home Mortgage Disclosure Act, 12 U.S.C. §§ 2801–2810, which indicated that African-American and Hispanic borrowers paid more for mortgage loans than non-Hispanic whites. The staff's investigation focused on whether the underwriting risk and the credit characteristics of the borrowers justified the reported disparities in loan price.

Homecomings originated the vast majority of its loans through independent brokers, and Homecomings' policy and practice was to set the risk-based price and other terms of its brokered loans. In addition, Homecomings' policy and practice was to allow brokers to assess discretionary charges on these loans, within certain limits set by Homecomings. These discretionary charges took the form of (1) fees charged at the time of origination, including broker points and fees, and (2) higher interest rates, in return for which Homecomings paid brokers yield spread premiums.

Based on an extensive investigation, which included obtaining and analyzing Homecomings' full and complete loan data, the staff's statistical analyses of the data show that, on average, Homecomings charged African-American and Hispanic borrowers substantially more for home purchase and refinance loans than similarly-situated non-Hispanic whites. The staff further determined that these disparities were caused by Homecomings' policy and practice of allowing its brokers broad discretion to determine the amount of discretionary fees charged to borrowers in addition to the risk-based price. The staff concluded that the disparities in these discretionary charges are substantial, statistically significant, and cannot be explained by any legitimate underwriting or credit characteristics in violation of the ECOA and the FTC Act.

During the course of this investigation, Homecomings ceased originating mortgage loans and stated it has no intention to resume mortgage lending in the future. In addition, Residential Capital LLC ("ResCap"), an indirect parent company of Homecomings, filed a 10-Q Quarterly Report for the third quarter 2008 for ResCap and its direct and indirect subsidiaries, including Homecomings (collectively, the "Company"), which states that the ability of the Company to continue as a going concern is in substantial doubt. The 10-Q further notes that the Company is heavily dependent on its own indirect parent, GMAC, LLC, for funding and capital support and that there can be no assurance that such support will continue. Because of these developments and based on additional information provided by the Company regarding its financial status, the staff has closed the investigation. However, the staff will continue to monitor future developments concerning Homecomings, including whether GMAC's recent conversion to a bank holding company [1] and its receipt of financial assistance from the U.S. Department of the Treasury,[2] may affect Homecomings' operating and financial status. If warranted by materially changed circumstances, the staff will take appropriate action, including the reopening of this investigation.

This action is not to be construed as a determination by the Commission that a violation of the ECOA, its implementing Regulation B, and the FTC Act did not occur, just as the pendency of an investigation should not be construed as a determination that a violation has occurred. The Commission reserves the right to take such further action as the public interest may require.

Sincerely,

Peggy L. Twohig
Associate Director
Division of Financial Practices

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[1] On December 24, 2008, the Board of Governors of the Federal Reserve System approved GMAC's request to become a bank holding company. *See* GMAC LLC & IB Finance Holding Co., LLC, Order Approving Formation of Bank Holding Companies and Notice to Engage in Certain Nonbanking Activities, Fed. Reserve Sys. (Dec. 24, 2008), http://www.federalreserve.gov/newsevents/press/orders/orders20081224a1.pdf. GMAC's new status as a bank holding company does not affect the Commission's jurisdiction over Homecomings as a nonbank subsidiary.

[2] On December 29, 2008, the U.S. Treasury Department announced that it will purchase $5 billion in senior preferred equity from GMAC and will lend up to $1 billion to General Motors (GM) so that GM can contribute to GMAC's reorganization as a bank holding company. *See* Press Release, U.S. Dept. of the Treasury, Treasury Announces TARP Investment in GMAC, (Dec. 29, 2008), http://www.treas.gov/press/releases/hp1335.htm.

About LSI TITLE and associated investigations.

a. LSI is owned by Lender Processing Services (LPS).

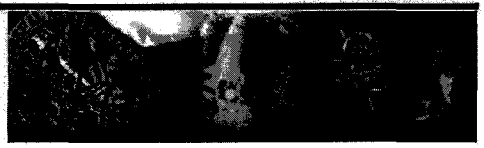
b. LPS is also known under the name Fidelity National Financial, Inc.(FNF) A visit to the LSI website *www.lendersservice.com/* evidences them as a LSI Division, a Lender Processing Services [LPS] company. LPS, doing business as LPS Default Solutions, is also known as and doing business as DocX, LLC. These firms are currently the subject of investigation by the Florida Attorney General's Economic Crimes Division and a foreclosure document fraud report the Attorney General circulated for the benefit of the public and the other 49 Attorney Generals in the National Attorney General's Mortgage Foreclosure Multistate Group. This report includes: *"DocX had offices employing dozens of workers producing thousands of fraudulent assignments. Lender Processing Services produced 2,000 assignments each working day."*

c. California, Florida, Michigan, Illinois, Washington and other state attorney generals are investigating the parties and clearly state the problem: *"Subject corporations (those mentioned in the above paragraph) seem to be creating and manufacturing "bogus assignments" of mortgage in order that foreclosures may go through more quickly and efficiently. These documents appear to be forged, incorrectly and illegally executed, false and misleading. These documents are used in court cases as "real" documents of assignment and presented to the court as so, when it actually appears that they are fabricated in order to meet the demands of the institution that does not, in fact, have the necessary documentation to foreclose according to the law."*

skip to content

Today is August 08, 2011

OFFICE OF THE
ATTORNEY GENERAL of FLORIDA
PAM BONDI



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Active Public Consumer-Related Investigation

The case file cited below relates to a civil -- not a criminal-- investigation. The existence of an investigation does not constitute proof of any violation of law.

Case Number:	L10-3-1094
Subject of investigation:	Fidelity National Financial, Inc. and FNF Capital Leasing, Inc. f/k/a Lender Processing Services, Inc., and D/B/A LPS Default Solutions and a/k/a and d/b/a Docx, LLC., a foreign corporation
Subject's address:	601 Riverside Avenue Jacksonville Florida 32204
Subject's business:	foreclosure related

Allegation or issue being investigated:
Docx has produced numerous documents called Assignments of Mortgage, that to even the untrained eye, appear to be forged and/or fabricated as the signatures of the same individual vary wildly from document to document. These documents are then used to gain standing for the plaintiff in a foreclosure suit. Subject corporations seem to be creating and manufacturing "bogus assignments" of mortgage in order that foreclosures may go through more quickly and efficiently. These documents appear to be forged, incorrectly and illegally executed, false and misleading. These documents are used in court cases as "real" documents of assignment and presented to the court as so, when it actually appears that they are fabricated in order to meet the demands of the institution that does not, in fact, have the necessary documentation to foreclose according to law.

AG unit handling case:	Economic Crimes Division in Ft. Lauderdale, Florida

May be used at top:

Enter parties currently under multiple attorney general investigation for fabricating and falsifying foreclosure loan documentation. The 04/16/2010 Notice of Default referenced in the paragraph above is made by LSI Title as agent for Atlantic & Pacific Foreclosure Services. As the evidence in the Evidentiary Findings section reveals, LSI and its parent are the subject of investigations and widely known in the industry to employ workers producing thousands of fraudulent Assignments each working day. The attorney generals clearly state the problem as *"creating bogus assignments of mortgage to make foreclosures go through more quickly and efficiently. The documents appear to be forged, incorrectly and illegally executed, false and misleading and used in court as "real" documents of assignment and presented to the court as so, when it actually appears that they are fabricated in order to meet the demands of the institution that does not, in fact, have the necessary documentation to foreclose according to law."*

VII, Chapter 6: Foreclosure Prevention Alternatives (10/31/08)

Fannie Mae does not want to foreclose a delinquent mortgage loan if there is a reasonable chance of avoiding foreclosure. If the reason for default appears to be long-term or too serious for the short-term relief measures that are discussed in *Chapter 3, Delinquency Prevention*, to be effective, the servicer must consider Fannie Mae's permanent foreclosure prevention alternatives.

All conventional mortgage loans are eligible for foreclosure prevention alternatives—those held in Fannie Mae's portfolio, those purchased for Fannie Mae's portfolio but subsequently sold to back an MBS issue, and those originally delivered as part of an MBS pool. While Fannie Mae does not require that its foreclosure prevention alternatives be used for regular servicing option MBS mortgage loans, shared-risk special servicing option MBS mortgage loans while the servicer's shared-risk liability remains in effect, and other mortgage loans sold to Fannie Mae under a recourse or other credit enhancement arrangement, Fannie Mae encourages a servicer to use them for these mortgage loans. However, when a servicer decides to use Fannie Mae's foreclosure prevention alternatives for such mortgage loans, Fannie Mae will not be responsible for any losses or expenses the servicer incurs and will not pay the incentive fees it usually pays for certain foreclosure prevention alternatives.

For servicers who service first-lien mortgage loans owned or securitized by Fannie Mae and also service subordinate-lien mortgage loans for themselves or other investors, and the servicer determines that a borrower of a first-lien mortgage loan owned or securitized by Fannie Mae is eligible for one of the foreclosure prevention alternatives, an offer to the borrower to accept the foreclosure prevention alternatives should not be contingent upon the borrower making payments or bringing current any subordinate liens which may also exist on the property. Fannie Mae recognizes that in some cases it may be necessary to make a small payment to a subordinate lien holder when the servicer determines that it is otherwise beneficial to pursue either a preforeclosure sale, a deed-in-lieu of foreclosure, or a loan modification (which may require a resubordination of the subordinate lien) as the foreclosure prevention alternative. In those instances, the servicer must obtain Fannie Mae's prior written approval to make the payment.

Generally, Fannie Mae's standard guidelines governing foreclosure prevention options also apply to EA/TPR™ (Expanded Approval/Timely Payment Awards) mortgage loans. All workout cases for EA/TPR mortgage loans must be submitted to Fannie Mae for prior approval. There is no delegation of authority for approving workouts for EA/TPR mortgage loans.

The servicer of a Community Living® mortgage loan must be sensitive to the importance of working with the borrower and the funding agency to resolve a serious delinquency. In particular, Fannie Mae requires the servicer to devote additional resources to foreclosure prevention efforts when the group home that secures a delinquent Community Living mortgage loan is still being occupied by disabled tenants and, if appropriate, delay the initiation of foreclosure. In such cases, the servicer may ask Fannie Mae to work with the borrower and the funding agency if that agency wants to pursue workout arrangements (such as a repayment plan, mortgage modification, loan assumption, or special refinancing) to avoid the additional costs of finding replacement housing for the tenants.

For government mortgage loans, a servicer must offer the specific foreclosure prevention alternatives that the mortgage insurer or guarantor makes available. Fannie Mae does not design workout alternatives specifically for government mortgage loans, but, on a case-by-case basis, is willing to consider approving the use of one of its standard alternatives for a government mortgage loan—as long as the proposed workout is acceptable to the insurer or guarantor and would not result in a loss to Fannie Mae. When Fannie Mae has implemented special procedures related to specific workout alternatives offered by one of the government agencies, they are discussed in this *Chapter*. For example, FHA mortgage loans are not eligible for the HomeSaver Advance (HSA) foreclosure prevention option. Servicers of FHA mortgage loans must utilize FHA's Partial Claim foreclosure prevention option in lieu of the HSA, if applicable. However, VA mortgage loans and Rural Development (RD) mortgage loans are eligible for an HSA.

If a servicer learns about the issuance of a lead-based paint citation, obtains other evidence of lead-based paint law violations, or becomes aware of threatened or pending lead-based paint litigation for any mortgage loan secured by a one-unit investment property or a two- to four-unit property for which it is considering a foreclosure prevention alternative, the servicer must send Fannie Mae a copy of any documentation it has related to lead-based paint law violations or threatened or pending lead-based paint litigation. The servicer must notify Fannie Mae about the current value of the property, the amount of Fannie Mae's outstanding debt, and the number of children under eight years of age who are residing in the property (giving the exact age of each child). If the security property is located in Massachusetts, the servicer must conduct an actual search to determine whether there are any outstanding lead-based paint citations against the property or the property owner before it recommends a foreclosure prevention alternative to Fannie Mae.

Fannie Mae's workout hierarchy outlined in the introduction to this *Part* recommends the preferred order of consideration for the use of special relief measures and foreclosure prevention options to resolve a delinquency.

VII, 610: Home Affordable Modification Program (04/21/09)

Under the Treasury Department's (Treasury) Home Affordable Modification program (HAMP), servicers will use a uniform loan modification process to provide eligible borrowers with sustainable monthly payments. All servicers must participate in HAMP for all eligible mortgage loans held in Fannie Mae's portfolio or that are part of an MBS pool that has the special servicing option or a shared-risk MBS pool for which Fannie Mae markets the acquired property.

The following words or terms are commonly used terms that relate to HAMP.

A	*Automated Valuation Model (AVM).* Statistically based computer programs that use real estate information, such as comparable sales, property characteristics, tax assessments, and price trends, to provide an estimate of value for a specific property.
B	*Broker's Price Opinion (BPO).* A written estimate of the probable sales price of a property performed by a real estate broker or sales person who may or may not have conducted an interior property inspection.
C	*Cash Reserves.* Liquid assets such as cash, savings, money market funds, marketable stocks or bonds (excluding retirement accounts).
E	*Escrow Shortage.* The amount by which the current escrow account balance falls short of the target balance at the time of the escrow analysis. This amount may not be capitalized. For HAMP purposes only, if the borrower is unable to contribute to the escrow shortage up front, the servicer must collect such funds from the borrower over a 60-month period.
F	*FHA HOPE for Homeowners.* The Federal Housing Administration's refinance program to help borrowers at risk of default and foreclosure to refinance into more affordable, sustainable mortgage loans. The HOPE for Homeowners program is effective from October 1, 2008 to September 30, 2011.
H	*HAMP.* Home Affordable Modification Program.
I	*Interest Rate Cap.* The Freddie Mac Weekly Primary Mortgage Market Survey® (PMMS®) Rate for 30-year fixed-rate conforming mortgage loans, rounded to the nearest 0.125 percent as of the date that the modification agreement is prepared. The Freddie Mac PMMS is available on FreddieMac.com.
	Interim Month. The month in between the last day of the final trial period month and the modification effective date when the modification effective date is extended to the first day of the second month following the last day of the trial period. Also see *Trial Period Plan Cut-off Date.*
J	*Jumbo Conforming Mortgage Loans.* Jumbo conforming mortgage loans are conventional mortgage loans sold to Fannie Mae that were originated from July 1, 2007 through and

	including December 31, 2008, with original UPBs that exceed Fannie Mae's base conforming mortgage loan limits ($417,000 for a one-unit property). The original UPB of a Jumbo conforming mortgage loan may not exceed the lesser of: • 125 percent of the "area median house price" (as determined at a county level) of a residence of applicable size, or • 175 percent of the base conforming mortgage loan limit: $729,750 for a one-unit property (except in Alaska, Hawaii, Guam, and the U.S. Virgin Islands, where the limit is higher). The Jumbo conforming mortgage loan limits were enacted as part of the Economic Stimulus Act of 2008.
L	*Loss of Good Standing.* Achieved when three monthly payments are due and unpaid on the last day of the third month. Once lost, good standing cannot be restored. The mortgage loan is no longer eligible to receive borrower and servicer incentives and all accrued but unpaid incentive payments will be forfeited.
M	*Mark-to-Market LTV (MTMLTV) Ratio.* The ratio between (i) the current UPB of the mortgage loan and (ii) the current value of the property that secures the mortgage loan.
	Modification Effective Date. The first day of the month following the successful completion of the trial period plan.
	Monthly Mortgage Payment Ratio. The amount of the monthly mortgage payment divided by the borrower's gross monthly income. For purposes of HAMP, the monthly mortgage payment includes the monthly payment of principal, interest, property taxes, hazard insurance, flood insurance, condominium fees, homeowners' association fees, and cooperative maintenance fees (as applicable) and any applicable escrow shortage payments subject to the 60-month repayment plan. The monthly mortgage payment does not include mortgage insurance premiums or payments due to subordinate-lien holders.
	Modified Interest Bearing Balance. The portion of the post-modification UPB excluding the principal forbearance amount.
N	*Net Present Value (NPV) Test.* A test using the NPV model and mortgage loan or borrower attributes (for example, MTMLTV, current monthly mortgage payment, current credit score, delinquency status) and various assumptions to determine the value of a modification as compared to no modification.
	Non-Borrower Household Income. Income from someone other than a borrower who resides in the property and whose income has been and can reasonably continue to be relied upon to support the mortgage payment.
P	*Principal Forbearance.* For the purposes of HAMP, the portion of the principal balance that is required to be deferred to reach the Targeted Monthly Mortgage Payment Ratio. This amount of principal will result in a non-interest-bearing, non-amortizing balloon payment fully due and payable upon the earliest of the transfer of the property, pay-off of the interest-bearing UPB, or maturity of the mortgage loan.
T	*Target Monthly Mortgage Payment Ratio.* For purposes of HAMP, as close as possible but no less than 31 percent of the borrower's gross monthly income.
	Trial Payment Period. A three-month period prior to the modification effective date during which the borrower makes payments approximating an amount equal to the modified payment as a condition of the modification. If the borrower is facing imminent default, the trial period must be four months in length.
	Trial Period Plan Cut-off Date. The date by which a borrower's last trial period payment must be received for the modification to be effective the first day of the month following the last trial period month. The cut-off date must be after the due date of the final trial period payment. A servicer must treat all borrowers the same when applying the Trial Period Plan Cut-off Date as evidenced by a written policy.
	Trial Period Plan Effective Date. The effective date of the trial period plan. If the servicer completes and transmits the trial period plan to the borrower on or before the 15th day of a calendar month, then the servicer should insert the first day of the next month as the Trial Period Plan Effective Date. If the servicer completes and transmits the trial period plan to the borrower

	after the 15th day of a calendar month, the servicer should use the first day of the second month as the Trial Period Plan Effective Date.
	Trial Period Offer Deadline. The last day of the month in which the Trial Period Plan Effective Date occurs. The servicer must receive the borrower's first trial period payment on or before this date.

VII, 610.01: HAMP Eligibility (06/01/10)

A mortgage loan is eligible for HAMP if it is a Fannie Mae portfolio mortgage loan or MBS mortgage loan guaranteed by Fannie Mae and all of the following criteria are met:

- The mortgage loan is a first-lien conventional mortgage loan originated on or before January 1, 2009. Jumbo-conforming mortgage loans are eligible.
- The mortgage loan has not been previously modified under HAMP.
- The mortgage loan is delinquent or default is reasonably foreseeable; mortgage loans currently in foreclosure are eligible.
- The mortgage loan is secured by a one- to four-unit property, one unit of which is the borrower's principal residence. Cooperative share mortgages and mortgage loans secured by condominium units are eligible for HAMP. Mortgage loans secured by manufactured housing units are eligible for HAMP.
- The property securing the mortgage loan must not be vacant or condemned.
- The borrower documents a financial hardship and represents that he or she does not have sufficient liquid assets to make the monthly mortgage payments by completing a Request for Modification and Affidavit (RMA) and providing the required income documentation. The documentation supporting income may not be more than 90 days old (as of the date that such documentation is received by the servicer in connection with evaluating a mortgage loan for HAMP).
- The borrower currently has a monthly mortgage payment ratio greater than 31 percent.
- A borrower in active litigation regarding the mortgage loan is eligible for HAMP.
- The servicer may not require a borrower to waive legal rights as a condition of HAMP.
- A borrower actively involved in a bankruptcy proceeding is eligible for HAMP at the servicer's discretion. Borrowers who have received a Chapter 7 bankruptcy discharge in a case involving the first-lien mortgage loan who did not reaffirm the mortgage debt under applicable law are eligible, provided the *Home Affordable Modification Trial Period Plan Notice* and *Home Affordable Modification Agreement* (Form 3157) are revised as outlined in *Section 610.04.06, Executing the HAMP Documents (06/01/10)* under "Acceptable Revisions to HAMP Documents."
- The borrower agrees to set up an escrow account for taxes, hazard insurance, and flood insurance prior to the beginning of the trial period if one does not currently exist.
- Mortgage loans subject to full lender recourse, including MBS mortgage loans and portfolio mortgage loans, are ineligible for the Fannie Mae HAMP. However, servicers should consider these mortgage loans for the non–Government Sponsored Enterprise (GSE) HAMP.
- Borrowers may be accepted into the program if the *Home Affordable Modification Trial Period Plan Notice* is issued to the borrower on or before December 31, 2012.

FHA mortgage loans that are held in Fannie Mae's portfolio or that are part of an MBS pool that has the special servicing option or a shared risk MBS pool for which Fannie Mae markets the acquired property are eligible for the FHA-HAMP as outlined in FHA Mortgagee Letter 2009-23. Mortgage loans guaranteed or held by other federal government agencies (i.e., VA and RD) may also be eligible for HAMP in the future and will be subject to guidance issued by the applicable government agency.

A servicer must consider for modification under HAMP all first-lien home equity loans and lines of credit that meet the basic HAMP eligibility criteria so long as:

- the servicer has the capability within its servicing system to clearly identify the mortgage loan as a first lien, and
- the servicer has the ability to establish an escrow for the mortgage loan.

Servicers whose systems do not provide the required functionality are strongly encouraged to complete system enhancements that will allow modification of first-lien home equity loans and lines of credit. In the event a servicer utilizes a separate servicing system for first-lien mortgage loans other than equity loans and lines of credit and would convert the home equity loan or line of credit to the first-lien mortgage system in order to establish an escrow account, the servicer may wait until the borrower successfully completes the trial period plan before establishing an escrow account. However, the trial period payment must still equal the target monthly mortgage payment ratio.

Any HAMP modification of a first-lien HELOC must result in a modified mortgage loan that is a fixed-rate, fully amortizing mortgage loan that does not permit the borrower to draw any further amounts from the line of credit. Accordingly, servicers should insert the following language as section 4[O] of the *Home Affordable Modification Agreement* (Form 3157):

> If my Loan Documents govern a home equity loan or line of credit, then I agree that as of the Modification Effective Date, I am terminating my right to borrow new funds under my home equity loan or line of credit. This means that I cannot obtain additional advances, and must make payments according to this Agreement. (Lender may have previously terminated or suspended my right to obtain additional advances under my home equity loan or line of credit, and if so, I confirm and acknowledge that no additional advances may be obtained.)

A borrower is ineligible for a subsequent HAMP offer if:

- the borrower previously received a HAMP modification and lost good standing; or
- the borrower is considered to have failed the trial period plan because a trial period payment was not received by the servicer by the last day of the month in which it was due.

A borrower who has been evaluated for HAMP but does not meet the minimum eligibility criteria described in this *Servicing Guide*, or who meets the minimum eligibility criteria but is not qualified for HAMP by virtue of:

- a negative net present value (NPV) result where the value for the "no modification" scenario exceeds the value for the "modification" scenario by more than $5,000;
- excessive forbearance; or
- other financial reason;
- may request reconsideration for HAMP at a future time if he or she experiences a change in circumstance.

VII, 610.02: HAMP Documents (06/01/10)

The HAMP documents are available on eFannieMae.com. Documents include the following:

- *Solicitation Letter*;
- *Making Home Affordable Program Hardship Affidavit* (Form 1021);
- *Request for Modification and Affidavit* (RMA). Servicers may use other proprietary financial information forms that are substantially similar in content to the RMA. When the RMA is not used, servicers must obtain an executed Form 1021. Servicers may also incorporate all of the information on this standalone affidavit into their own form;
- *Home Affordable Modification Trial Period Plan Notice*;
- *Home Affordable Modification Documentation Request Letter*;
- IRS Form 4506-T (Request for Transcript of Tax Return) or IRS Form 4506T-EZ (Short Form Request for Individual Tax Return Transcript);
- *Home Affordable Modification Agreement Cover Letter*;
- Home Affordable Modification Agreement (Form 3157, hereinafter referred to as the "Agreement"); and
- *Home Affordable Modification Program Counseling Letter*.

VII, 610.03.01: Determining Hardship (04/21/09)

Every borrower and co-borrower (if applicable) seeking a modification, whether in default or not, must sign an RMA that attests to and describes one or more of the following types of hardship:

- A reduction in or loss of income that was supporting the mortgage loan; for example, unemployment, reduced job hours, reduced pay, or a decline in self-employed business earnings.
- A change in household financial circumstances; for example, death in family, serious or chronic illness, permanent or short-term disability, or increased family responsibilities (adoption or birth of a child, taking care of elderly relatives or other family members).
- A recent or upcoming increase in the monthly mortgage payment.
- An increase in other expenses; for example, high medical and health-care costs, uninsured losses (such as those due to fires or natural disasters), unexpectedly high utility bills, or increased real property taxes.
- A lack of sufficient cash reserves to maintain payment on the mortgage loan and cover basic living expenses at the same time. Cash reserves include assets such as cash, savings, money market funds, marketable stocks or bonds (excluding retirement accounts and assets that serve as an emergency fund – generally equal to three times the borrower's monthly debt payments).
- Excessive monthly debt payments and overextension with creditors; for example, the borrower was required to use credit cards, a home equity loan, or other credit to make the mortgage payment.

A borrower may provide evidence of hardship for reasons other than those explicitly listed above. A servicer who believes that Fannie Mae should consider a borrower for HAMP for reasons not listed above must request prior written approval from Fannie Mae on a case-by-case basis. To request Fannie Mae

approval, servicers must contact Fannie Mae at 1-888-FANNIE5 1-888-FANNIE5 (1-888-326-6435 1-888-326-6435) or by email to servicing_solutions@fanniemae.com.

VII, 610.03.02: Government Monitoring Data (04/21/09)

The Department of Housing and Urban Development (HUD) has directed Fannie Mae, pursuant to HUD's authority under Section 1325(2) of the Federal Housing Enterprises Financial Safety and Soundness Act (FHEFSSA), 24 C.F.R. 81.44(a) and (b), 12 C.F.R. 202.5(a)(2), and its general regulatory authority under the Fair Housing Act, 42 U.S.C. 3601 et seq. (the Act) to require servicers to request and report data on the race, ethnicity, and sex of borrowers involved in potential loan modifications under HAMP ("Government Monitoring Data") in order to monitor compliance with the Act and other applicable fair lending and consumer protection laws. This section of the *Servicing Guide* is incorporated into the Mortgage Selling and Servicing Contract (MSSC) between Fannie Mae and its servicers and constitutes an agreement entered into between Fannie Mae, on behalf of HUD, and Fannie Mae's approved servicers. As such, this is an agreement entered into by Fannie Mae's approved servicers with an enforcement agency (i.e., HUD) to permit the enforcement agency to monitor or enforce compliance with federal law, within the meaning of 12 C.F.R. 202.5(a)(2).

HUD has specified that the Government Monitoring Data shall be collected in the RMA. Servicers must request, but not require, that each borrower who completes an RMA in connection with HAMP furnish the Government Monitoring Data. If any borrower chooses not to provide the Government Monitoring Data, or any part of it, the servicer must note that fact on the RMA in the space provided. In such circumstances, and if the RMA is completed in a face-to-face setting, the servicer, its representative, or agent shall then also note on the form, to the extent possible on the basis of visual observation or surname, the race, ethnicity, and sex of any borrower or co-borrower who has not furnished the Government Monitoring Data. If any borrower declines or fails to provide the Government Monitoring Data on an RMA taken by mail or telephone or on the Internet, the data need not be provided. In such a case, the servicer must indicate that the RMA was received by mail, telephone, or Internet, if it is not otherwise evident on the face of the RMA.

VII, 610.03.03: Reasonably Foreseeable (Imminent) Default (06/01/10)

Servicers are prohibited from soliciting borrowers who are current or less than 30 days delinquent for participation in HAMP. However, if such a borrower contacts the servicer, the servicer may consider HAMP as a viable foreclosure prevention alternative. The servicer must make a determination that the borrower is facing imminent default prior to sending a firm offer to such a borrower.

A borrower who is current, contacts the servicer for a modification, appears potentially eligible for a modification, and has suffered an eligible hardship (as described in *Section 610.03.01, Determining Hardship (04/21/09)*) must be evaluated using Freddie Mac's Imminent Default Indicator™ (IDI), a statistical model that predicts the likelihood of default or serious delinquency. IDI must also be used to evaluate such borrowers who are in default but less than 60 days delinquent.

For borrowers who must be evaluated using IDI, the servicer must evaluate the borrower's financial condition in light of the borrower's hardship, as well as the condition of and circumstances affecting the property securing the mortgage loan. The servicer must verify all financial documentation (income *and* asset) for all borrowers of mortgage loans that are either current or less than 60 days delinquent prior to offering a trial period plan.

Servicers must obtain a completed RMA from the borrower(s) to evaluate the borrower's financial condition in determining whether the borrower is facing imminent default, and must also obtain a current credit report for the borrower(s) to validate and supplement the borrower's information. The servicer should request such other documents from borrower(s) as deemed necessary to evaluate the borrower's financial condition.

A borrower is not considered in imminent default if the borrower has cash reserves equal to or exceeding $25,000. If the borrower's cash reserves are less than $25,000, the loan must be submitted through the IDI. If the IDI result is a "1," the mortgage loan is categorized as "at risk of imminent default," and may be considered in imminent default. However, if the borrower's cash reserves are less than $25,000 and the IDI result is a "2," the mortgage loan is NOT categorized as "at risk of imminent default." The servicer may further evaluate a borrower for HAMP if the borrower can demonstrate that he or she is experiencing an acceptable hardship. Acceptable hardships include death, divorce, or legal separation of a borrower/co-borrower, or long-term or permanent illness or disability of a borrower/co-borrower or dependent family member. The servicer must obtain copies of documentation of an acceptable hardship as outlined below.

Death of a borrower/co-borrower:

- death certificate, or
- obituary or newspaper article reporting the death, and
- income documentation prior to the event compared to income documentation of the remaining borrower after the event.

Long-term or permanent illness or disability of a borrower/co-borrower or persons other than the borrower/co-borrower who is claimed as a dependent for federal income tax purposes:

- medical bills,
- doctor's certificate of illness or disability,
- proof of monthly insurance benefits or government assistance (if applicable), or
- federal income tax return showing medical deductions above the minimum for itemized deductions.

Divorce or legally documented separation of borrower/co-borrower:

- divorce decree signed by the court;
- current credit report evidencing recorded divorce decree;
- separation agreement signed by the court if the separation is legally documented by the court;
- current credit report evidencing recorded separation agreement; or
- in cases where the borrowers are unmarried, a recorded quitclaim deed indicating that either borrower relinquishes all rights to the property securing the mortgage loan; or
- income or expense documentation prior to the event compared to the income or expense documentation of the remaining borrower after the event.

Servicers will launch the File Transfer Portal link either through eFannieMae.com or HSSN and log in using its HSSN user ID and password. A servicer is required to create a Microsoft® Excel® spreadsheet that includes all of the data elements required for an imminent default determination and upload the input file in a Comma Separated Variable (CSV or.csv) format. Only mortgage loans owned or securitized by Fannie Mae are permitted in the input file. A sample Excel spreadsheet—the IDI Data Submission File—is available on eFannieMae.com. It outlines the required data elements, specifies the order in which the data elements must be presented, and provides instructions for creating and submitting the CSV input file.

The following information is provided about three of the data elements in the input file:

Credit Score — If the servicer obtains multiple credit scores for a single borrower, the servicer must select a representative credit score using the lower of two or the middle of three credit scores. If there are multiple borrowers, the servicer must determine the representative score for each borrower and enter the lowest representative score as the credit score for the mortgage loan.

Monthly debt payment-to-income ratio — For the purposes of the imminent default evaluation, a servicer may not include unemployment income in the calculation of the borrower's monthly gross income when calculating the total monthly debt payment-to-income ratio.

Property Value — The servicer must provide the property value used for the initial Net Present Value (NPV) test, which must be less than 90 days old on the date the servicer performs the initial NPV test. Therefore, the servicer must ensure that the property value used during any initial evaluation does not subsequently become more than 90 days old by the time the servicer inputs the property value into the NPV model. Servicers are not required to update the property valuation during the remainder of the trial period for any subsequent NPV evaluation.

The CSV input file will be evaluated by the IDI model and an email notification will be sent to the servicer when the IDI results are available. The time it takes to return the results will depend on the size of the file; however, it is anticipated that results will be returned within a few hours. Once available, the servicer will log into the File Transfer Portal to retrieve the output file. The output file provided to the servicer will be returned in the CSV format. Only results obtained from the IDI in HSSN will be acceptable to make an imminent default determination for Fannie Mae–owned or securitized mortgage loans.

A servicer must document in its servicing system the basis for its determination that the borrower is facing imminent default. The servicer's determination must include identification of the borrower's hardship, which will generally be identified in the RMA, and the anticipated or actual timing of the default. The servicer's documentation must also include the information regarding the borrower's financial condition utilized in determining that the borrower is facing imminent default as required above, as well as the condition and circumstances of the property securing the mortgage loan. The servicer must report the reason(s) for the anticipated or actual delinquency along with the delinquency status code 09 – Forbearance, during the trial payment period.

VII, 610.03.04: Net Present Value (NPV) Test (11/02/09)

All mortgage loans that meet the HAMP eligibility criteria must be evaluated using a standard NPV test for reporting purposes. The servicer must maintain detailed documentation of the NPV model and version used, all NPV inputs and assumptions, and the NPV results. If the value for the no-modification scenario exceeds the value for the modification scenario by more than $5,000, the servicer must not perform the modification without the express written consent of Fannie Mae. For example, if the no-modification scenario produces a value of $10,000 and the modification scenario produces a value of $4,000, the servicer must not perform the modification.

The NPV model is available on the Home Affordable Modification servicer web portal accessible through HMPadmin.com. On this portal, servicers will have access to the NPV model as well as the NPV User Guide, providing detailed guidelines for submitting proposed modification data.

A servicer having at least a $40 billion servicing book will have the option to create a customized NPV model that uses a set of default rates and redefault rates estimated based on the experience of its own portfolios, taking into consideration, if feasible, current LTV, current monthly mortgage payment, current credit score, delinquency status, and other loan or borrower attributes. Detailed guidance on required inputs for a customized NPV model is available on HMPadmin.com.

To obtain a property valuation input for the NPV model, servicers may use either an automated valuation model (AVM), provided that the AVM renders a reliable confidence score, a broker price opinion (BPO), or an appraisal. Servicers may use an AVM provided by Fannie Mae or Freddie Mac. As an alternative, servicers may rely on their own internal AVM provided that:

- the servicer is subject to supervision by a Federal regulatory agency,
- the servicer's primary Federal regulatory agency has reviewed the model, and
- the AVM renders a reliable confidence score.

If a Fannie Mae or Freddie Mac AVM or the servicer AVM is unable to render a value with a reliable confidence score, the servicer must obtain an assessment of the property value utilizing a BPO or a property valuation method acceptable to the servicers' Federal regulatory supervisor. Such assessment must be rendered in accordance with the *Interagency Appraisal and Evaluation Guidelines* (as if such guidelines apply to loan modifications). In all cases, the property valuation used cannot be more than 90 days old as of the date that the servicer first evaluated the borrower for a HAMP trial period plan using the NPV model. The property valuation will remain valid for the duration and does not need to be updated for any subsequent NPV evaluation as outlined in *Chapter 6, Exhibit 1*.

The servicer should obtain the results of the NPV model at the time of the HAMP eligibility determination.

From time to time, the NPV base model will be updated and a new version of the NPV base model will be made available. Servicers will be allowed a grace period to implement each new version of the NPV base model. The grace period for each new version will be set forth in the applicable NPV release documentation. In addition, the release documentation will provide guidance as to which NPV model version servicers should use during the grace period. After the grace period, servicers must use either the most recent version of the base model or a customized version that meets the requirements for customization outlined in the model documentation.

In the event that a mortgage loan must be run through the NPV model more than once, a servicer should test the mortgage loan using the same major NPV model version each time the borrower is evaluated. All versions of the NPV model are available on HMPadmin.com. *Exhibit 1: NPV Versioning Requirements* outlines NPV versioning requirements and NPV input requirements for retesting.

VII, 610.03.05: Verifying Borrower Income and Occupancy Status (06/01/10)

A servicer may evaluate a borrower for HAMP only after the servicer receives the financial documentation (referred to as the "Initial Package") from the borrower (the term "borrower" includes any co-borrower(s)). The Initial Package includes:

- A signed and completed RMA.
- A signed and completed Internal Revenue Service Request for Transcript of Tax Return (Form 4506-T) or Short Form Request for Individual Tax Return Transcript (Form 4506T-EZ).
- Evidence of income as described in *Documenting Gross Monthly Income* later in this section.

Within 10 business days following receipt of an Initial Package, the servicer must acknowledge, in writing, the borrower's request for HAMP participation by sending the borrower confirmation that the Initial Package was received and a description of the servicer's evaluation process and timeline. If the Initial Package is received from the borrower via e-mail, the servicer may e-mail the acknowledgment. The servicer must maintain evidence of the date of receipt of the borrower's Initial Package in its records.

Within 30 calendar days from the date an Initial Package is received, the servicer must review the documentation provided by the borrower for completeness. If the documentation is incomplete, the servicer must send the borrower an Incomplete Information Notice in accordance with the guidance set forth in *Section 610.04.02, Borrower Notices (06/01/10)*. If the borrower's documentation is complete, the servicer must either:

- send the borrower a *Trial Period Plan Notice*; or
- make a determination that the borrower is not eligible for HAMP and communicate this determination to the borrower in accordance with *Section 610.04.02, Borrower Notices (06/01/10)*.

A borrower is eligible for HAMP if the financial documentation confirms that the monthly mortgage payment ratio prior to the modification is greater than 31 percent. For purposes of HAMP, "monthly mortgage payment ratio" is the ratio of the borrower's current monthly mortgage payment to the borrower's monthly gross income (or the borrowers' combined monthly gross income in the case of co-borrowers).

The monthly mortgage payment includes the monthly payment of principal, interest, property taxes, hazard insurance, flood insurance, condominium association fees, and homeowners' association fees, as applicable (including any escrow payment shortage amounts subject to the 60-month repayment plan). When determining a borrower's monthly mortgage payment ratio, servicers must adjust the borrower's current mortgage payment to include, as applicable, property taxes, hazard insurance, flood insurance, condominium association fees, and homeowners' association fees if these expenses are not already included in the borrower's payment. The monthly mortgage payment must not include mortgage insurance premium payments or payments due to holders of subordinate liens. If a borrower has indicated that there are association fees, but has not been able to provide written documentation to verify the fees, the servicer may rely on the information provided by the borrower if the servicer has made reasonable efforts to obtain the association fee information in writing.

Determining Gross Monthly Income

The borrower's "monthly gross income" is the borrower's income amount before any payroll deductions and includes wages and salaries, overtime pay, commissions, fees, tips, bonuses, housing allowances, other compensation for personal services, Social Security payments, including Social Security received by adults on behalf of minors or by minors intended for their own support, and monthly income from annuities, insurance polices, retirement funds, pensions, disability or death benefits, unemployment benefits, rental income, and other income such as adoption assistance. For the purposes of determining monthly gross income when non-taxable income is used to qualify for HAMP, and the income and its tax-exempt status are likely to continue, the servicer may develop an "adjusted gross income" for the borrower by adding an amount equivalent to 25 percent of the nontaxable income to the borrower's income.

If the actual amount of federal and state taxes that would generally be paid by a wage earner in a similar tax bracket is more than 25 percent of the borrower's nontaxable income, the servicer may use that amount to develop the adjusted gross income.

Servicers should include non-borrower household member income in monthly gross income if it is voluntarily provided by the borrower and if there is documentary evidence that the income has been, and can reasonably continue to be, relied upon to support the mortgage payment. All non-borrower household income included in monthly gross income must be documented and verified by the servicer using the same standards for verifying a borrower's income. (An example of non-borrower income is boarder income.) A servicer should not consider expenses of non-borrower household members but may consider the portion of his or her income that the non-borrower household member routinely contributes to the household as part of the monthly gross income calculation.

Documenting Gross Monthly Income

All parties whose income was used to qualify for the original mortgage note must submit income documentation, which must not be more than 90 days old as of the date that such documentation is received by the servicer in connection with evaluating a mortgage loan for HAMP. There is no requirement to refresh such documentation during the remainder of the trial period from the date HAMP eligibility is determined.

All borrowers may elect to provide signed federal income tax returns but are not required to do so. Every borrower must provide a signed and completed IRS Form 4506-T (Request for Transcript of Tax Returns) or IRS Form 4506T-EZ (Short Form Request for Individual Tax Return Transcript) that will allow the servicer (directly or through an authorized designee) to obtain the borrower's most recent federal income tax transcript from the Internal Revenue Service. A servicer must submit the Form 4506-T or IRS Form 4506T-EZ to the IRS for processing unless the borrower provides a signed copy of his or her most recent federal income tax return, including all schedules and forms. Form 4506T-EZ is a permissible substitute for Form 4506-T only for borrowers who filed a Form 1040 series tax return on a calendar year basis. All other borrowers must provide Form 4506-T. However, for borrowers facing imminent default, the servicer is required to obtain a signed federal income tax return in all cases.

A borrower is required only to submit his or her most recent federal income tax return. If a tax return or transcript is not available for the most recent tax year, the servicer may accept a signed tax return, electronically filed tax return, or transcripts for a prior tax year but must process the borrower's signed Form 4506-T with the IRS to confirm that the borrower did not file a current tax return. If a borrower is not required to file a tax return, the borrower must document why he or she was not required to file a tax return.

The servicer should review the tax return information for all borrowers to help verify income and identify discrepancies. If the tax information identifies income relevant to the HAMP decision that the borrower did not disclose on the RMA, the servicer must obtain other documentation to reconcile the inconsistency. In resolving inconsistencies, servicers must use reasonable business judgment to determine whether such income is no longer being earned or has been reduced to the amounts disclosed on an RMA. The servicer should ask the homeowner to explain material differences between the federal income tax returns/transcript and the RMA, and document such differences in the servicing system. A servicer should not modify a mortgage loan if there is reasonable evidence indicating the borrower submitted income information that is false or misleading or if the borrower otherwise engaged in fraud in connection with the modification.

The borrower (the term "borrower" includes any co-borrower) must provide certain financial information to the servicer as outlined below.

If the borrower is employed:

- A signed copy of the most recent federal income tax return.
- Copies of the two most recent paystubs, not more than 90 days old as of the date of submission, indicating year-to-date earnings.
    - Servicers may accept pay stubs that are not consecutive if, in the business judgment of the servicer, it is evident that the borrower's income has been accurately established.
    - When two pay stubs indicate different periodic income, servicers may use year-to-date earnings to determine the average periodic income, and account for any non-periodic income reflected in either of the pay stubs.
    - When verifying annualized income based on the year-to-date earnings reflected on pay stubs, servicers may, in their business judgment, make adjustments when it is likely that sources of

additional income (bonus, commissions, etc.) are not likely to continue.

If the borrower is self-employed:

- The most recent quarterly or year-to-date profit and loss statement for each self-employed borrower. Audited financial statements are not required.

Borrowers are not required to use alimony, separation maintenance, or child support income to qualify for HAMP. If the borrower elects to use alimony or child support income to qualify, acceptable documentation includes:

- Photocopies of the divorce decree, separation agreement, or other type of legal written agreement or court decree that provides for the payment of alimony or child support and states the amount of the award and the period of time over which it will be received.
- Documents supplying reasonably reliable evidence of full, regular, and timely payments, such as copies of deposit slips, or the two most recent bank statements showing deposit amounts.
- If the borrower voluntarily provides such income, and that income renders the borrower ineligible for a HAMP offer, the servicer is allowed to remove that income from consideration and re-evaluate the borrower for HAMP eligibility.

If the borrower has other income, such as Social Security, disability or death benefits, public assistance, adoption assistance, or a pension:

- Evidence of (i) the amount and frequency of the benefits, such as letters, exhibits, a disability policy, or benefits statement from the provider, and (ii) receipt of payment, such as copies of the two most recent bank statements or deposit advices showing deposit amounts. If a benefits statement is not available, servicers may rely only on receipt of payment evidence, if it is clear that the borrower's entitlement is ongoing.

If the borrower collects unemployment:

- Evidence of the amount, frequency, and duration of the benefits (usually obtained through a monetary determination letter). The unemployment income must continue for at least nine months from the date of the application. The duration of benefit eligibility—including federal and state extensions—may be evidenced by a screenshot or printout from the Department of Labor Unemployment Insurance benefit tool.

Passive and non-wage income, including rental income, part-time employment, bonuses, tips, and investment and benefit income, that constitutes less than 20 percent of the borrower's total gross income does not have to be documented. With the exception of borrowers facing imminent default, servicers may use undocumented income if declared by the borrower to qualify for HAMP. For a borrower facing imminent default, passive and non-wage income that exceeds $100 per month must be documented prior to being deemed eligible for the trial period; however, all passive and non-wage income must be verified based on documentation prior to final modification.

Rental income is generally documented through the Schedule E – Supplemental Income and Loss, for the most recent tax year.

- When Schedule E is not available to document rental income because the property was not previously rented, servicers may accept a current lease agreement and bank statements or cancelled rent checks.
- If the borrower is using income from the rental of a portion of the borrower's principal residence, the income may be calculated at 75 percent of the monthly gross rental income, with the remaining 25

percent considered vacancy loss and maintenance expense.

- If the borrower is using rental income from properties other than the borrower's principal residence, the income to be calculated for HAMP purposes should be 75 percent of the monthly gross rental income, reduced by the monthly debt service on the property (i.e., principal, interest, taxes, insurance, including mortgage insurance, and association fees), if applicable.

For other earned income (for example, bonus, commission, fee, housing allowance, tips, and overtime):

- Reliable third-party documentation describing the nature of the income (for example, an employment contract or printouts documenting tip income).

Verifying Occupancy

A servicer may solely rely on the address indicated on the credit report to verify occupancy so long as the credit report lists the property address as the borrower's current residence. If the credit report does not indicate the property address as the borrower's current residence, the servicer must perform additional due diligence prior to extending a HAMP offer which must be documented in the loan file/servicing system for compliance review purposes.

VII, 610.03.06: Standard Modification Waterfall (11/02/09)

Servicers must apply the proposed modification steps enumerated below in the stated order of succession until the borrower's monthly mortgage payment ratio is reduced as close as possible to 31 percent, without going below 31 percent (the "target monthly mortgage payment ratio").

Servicers must request prior written approval from Fannie Mae to deviate from the modification steps enumerated below or to reduce the borrower's monthly mortgage payment ratio below 31 percent. Prior written approval may be requested by submitting a non-delegated case into the HSSN. If approval is granted, borrower and servicer incentive payments for these modifications will be paid based on modification terms that reflect the target monthly mortgage payment ratio of 31 percent.

In the event that a modification step (for example, principal forbearance) is prohibited under applicable state law, a servicer may skip the modification step without obtaining Fannie Mae's prior written approval.

Note: If a borrower has an ARM loan or interest-only mortgage loan, the existing interest rate will convert to a fixed interest rate, fully amortizing mortgage loan.

Step 1: Capitalize accrued interest, out-of-pocket escrow advances to third parties, and any required escrow advances that will be paid to third parties by the servicer during the trial period and servicing advances paid to third parties in the ordinary course of business and not retained by the servicer, if allowed by state law. Late fees may not be capitalized and must be waived if the borrower satisfies all conditions of the trial period plan. If applicable state law prohibits capitalization of past-due interest or any other amount, the servicer must collect such funds from the borrower over a 60-month repayment period unless the borrower decides to pay the amount upfront.

Step 2: Reduce the interest rate. If the loan is a fixed-rate mortgage loan or an ARM loan, then the starting interest rate is the current interest rate (the note rate).

Reduce the starting interest rate in increments of 0.125 percent to get as close as possible to the target monthly mortgage payment ratio. The interest rate floor in all cases is 2 percent.

- If the resulting rate is below the Interest Rate Cap, this reduced rate will be in effect for the first five years followed by annual increases of 1 percent per year (or such lesser amount as may be

needed) until the interest rate reaches the Interest Rate Cap, at which time it will be fixed for the remaining mortgage loan term.

- If the resulting rate exceeds the Interest Rate Cap, then that rate is the permanent rate.

The Interest Rate Cap is the Freddie Mac Weekly Primary Mortgage Market Survey (PMMS) Rate for 30-year fixed-rate conforming mortgage loans, rounded to the nearest 0.125 percent, as of the date that the Agreement is prepared.

Step 3: If necessary, extend the term and reamortize the mortgage loan by up to 480 months from the modification effective date (that is, the first day of the month following the end of the trial period) to achieve the target monthly mortgage payment ratio. Negative amortization after the effective date of the modification is prohibited.

Step 4: If necessary, the servicer must provide for principal forbearance to achieve the target monthly mortgage payment ratio. The principal forbearance amount is non-interest-bearing and non-amortizing. The amount of principal forbearance will result in a balloon payment fully due and payable upon the earliest of the borrower's transfer of the property, payoff of the interest-bearing UPB, or maturity of the mortgage loan. A principal write-down or principal forgiveness is prohibited on Fannie Mae mortgage loans.

For mortgage loans eligible for HAMP and deemed NPV positive, servicers are not required to forbear more than the greater of:

- 30 percent of the UPB of the mortgage loan, or
- an amount resulting in a modified interest-bearing balance that would create a current mark-to-market loan-to-value ratio of less than 100 percent.

If the borrower's monthly mortgage payment cannot be reduced to the target monthly mortgage payment ratio of 31 percent unless the servicer forbears more than the amounts described above, the servicer may not perform the modification without the express written consent of Fannie Mae.

If the mortgage loan is deemed "NPV negative," where the value for the no-modification scenario exceeds the value for the modification scenario by more than $5,000, the servicer may not perform the modification without the express written consent of Fannie Mae. The servicer will need to compute the difference between the modification and no-modification scenarios in order to determine whether the $5,000 threshold has been exceeded.

Treatment of Option ARM Loans

Servicers are reminded that if a borrower has an ARM or interest-only mortgage loan, the interest rate will convert to a fixed-interest-rate, fully amortizing mortgage loan. For Fannie Mae ARM loans that provide for a monthly payment option (for example, specified minimum payment, interest-only payment, 30-year fully amortizing payment, or 15-year fully amortizing payment), the payment used to calculate the 31 percent monthly mortgage payment ratio should be the current payment legally due at the time the servicer determines eligibility regardless of imminent changes in the rate or amount of payment. This payment option must be used in the standard modification waterfall to reduce the borrower's monthly mortgage payment ratio as close as possible to, without going below, 31 percent.

VII, 610.03.07: Verifying Monthly Gross Expenses (04/21/09)

A servicer must obtain a credit report for each borrower or a joint report for a married couple who are co-borrowers to validate installment debt and other liens. In addition, a servicer must consider information concerning monthly obligations obtained from the borrower either verbally or in writing. The "monthly gross expenses" equal the sum of the following monthly charges:

- The monthly mortgage payment, including any mortgage insurance premiums, taxes, property insurance, homeowners' or condominium association fee payments, and assessments related to the property whether or not they are included in the mortgage payment.
- Monthly payments on all closed-end subordinate mortgages.
- Payments on all installment debts with more than 10 months of payments remaining, including debts that are in a period of either deferment or forbearance. When payments on an installment debt are not on the credit report or are listed as deferred, the servicer must obtain documentation to support the payment amount included in the monthly debt payment. If no monthly payment is reported on a student loan that is deferred or is in forbearance, the servicer must obtain documentation verifying the proposed monthly payment amount, or use a minimum of 1.5 percent of the balance.
- Monthly payment on revolving or open-end accounts, regardless of the balance. In the absence of a stated payment, the payment will be calculated by multiplying the outstanding balance by 3 percent.
- Monthly payment on a HELOC must be included in the payment ratio using the minimum monthly payment reported on the credit report. If the HELOC has a balance but no monthly payment is reported, the servicer must obtain documentation verifying the payment amount, or use a minimum of 1 percent of the balance.
- Alimony, child support, and separate maintenance payments with more than 10 months of payments remaining, if supplied by the borrower.
- Car lease payments, regardless of the number of payments remaining.
- Aggregate negative net rental income from all investment properties owned, if supplied by the borrower.
- Monthly mortgage payment for a second home (PITI and, when applicable, mortgage insurance, leasehold payments, homeowners' association dues, condominium unit or cooperative unit maintenance fees (excluding unit utility charges)).

Total Monthly Debt Ratio

The borrower's total monthly debt ratio ("back-end ratio") is the ratio of the borrower's monthly gross expenses divided by the borrower's monthly gross income. Servicers will be required to send the HAMP Counseling Letter to borrowers with a post-HAMP modification back-end ratio equal to or greater than 55 percent. The letter states that the borrower must work with a HUD-approved housing counselor on a plan to reduce their total indebtedness below 55 percent. The letter also describes the availability and advantages of counseling and directs the borrower to the appropriate HUD website where a list of housing counseling agencies is located. The borrower must represent in writing in the Agreement that he or she will obtain such counseling.

Fannie Mae encourages face-to-face counseling; however, telephone counseling is also permitted from HUD-approved housing counselors that covers the same topics as face-to-face sessions. Telephone counseling sessions provide flexibility to borrowers who are unable to attend face-to-face sessions or who do not have an eligible provider within their area.

A list of approved housing counseling agencies is available at hud.gov or by calling the toll-free housing counseling telephone referral service at 1-800-569-4287 1-800-569-4287 . A servicer must retain in its mortgage files evidence of the borrower notification.

There is no charge to either the borrower or the servicer for this counseling.

VII, 610.03.08: Mortgage Loans with No Due-on-Sale Provision (04/21/09)

If a mortgage loan that is not subject to a due-on-sale provision is modified under HAMP, the borrower agrees that HAMP will cancel the assumability feature of that mortgage loan.

VII, 610.03.09: Escrow Accounts (04/21/09)

All of the borrower's monthly payments must include a monthly escrow amount unless prohibited by applicable law. The servicer must assume full responsibility for administering the borrower's escrow deposit account in accordance with the mortgage documents and all applicable laws and regulations. If the mortgage loan being considered for HAMP is a non-escrowed mortgage loan, the servicer must establish an escrow deposit account in accordance with *Part III, Section 103, Escrow Deposit Accounts.* The escrow account must be established prior to the beginning of the trial period. Servicers may perform an escrow analysis based on estimates prior to extending a trial period plan offer. However, if a servicer estimates the escrow payments for the trial period plan, the servicer is not permitted to use national averages in the estimate calculations. Prior to determining the borrower's eligibility for HAMP based on verified documentation, servicers must complete an escrow analysis to determine the escrow payments.

When performing an escrow analysis, servicers should take into consideration tax and insurance premiums that may come due during the trial period. When the borrower's escrow account does not have sufficient funds to cover an upcoming expense and the servicer advances the funds necessary to pay an expense to a third party, the amount of the servicer advance that is paid to a third party may be capitalized.

In the event the initial escrow analysis identifies a shortage—a deficiency in the escrow deposits needed to pay all future tax and insurance payments—the servicer must collect such funds from the borrower over a 60-month period unless the borrower decides to pay the shortage upfront. Any escrow shortage that is identified at the time of HAMP eligibility may not be capitalized. Servicers are not required to fund any existing escrow shortage. A servicer may encourage a borrower to contribute to the escrow shortage upfront; however, that is not an eligibility requirement of HAMP.

When a servicer spreads the escrow shortage identified during the HAMP eligibility process over a 60-month period, any subsequent shortage that may be identified in the next annual analysis cycle should be spread out over the remaining term of the initial 60-month period. For example, if the next analysis cycle is performed 12 months after the initial escrow shortage is identified, any additional shortage identified in that analysis cycle should be spread over the remaining 48-month period.

VII, 610.03.10: Compliance with Applicable Laws (04/21/09)

Fannie Mae reminds each servicer (and any subservicer it uses) to be aware of, and in full compliance with, all federal, state, and local laws (including statutes, regulations, ordinances, administrative rules and orders that have the effect of law, and judicial rulings and opinions), including, but not limited to, the following laws that apply to any of its practices related to HAMP:

- Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts or practices.
- The Equal Credit Opportunity Act and the Fair Housing Act, which prohibit discrimination on a prohibited basis in connection with mortgage transactions. Loan modification programs are subject to the fair lending laws, and servicers and lenders should ensure that they do not treat a borrower less favorably than other borrowers on grounds such as race, religion, national origin, sex, marital or familial status, age, handicap, or receipt of public assistance income in connection with any loan

modification. These laws also prohibit redlining.

- The Real Estate Settlement Procedures Act, which imposes certain disclosure requirements and restrictions relating to transfers of the servicing of certain loans and escrow accounts.
- The Fair Debt Collection Practices Act, which restricts certain abusive debt collection practices by collectors of debts, other than the creditor, owed or due to another.

VII, 610.04: Modification Process (06/01/10)

This section provides guidance to servicers for the adoption and implementation of the HAMP process.

VII, 610.04.01: Borrower Solicitation (06/01/10)

Servicers may only solicit a borrower for HAMP if the borrower is currently two or more payments (31 or more days) past due. A servicer may also receive calls from current or delinquent borrowers inquiring about the availability of HAMP. A servicer should work with such borrowers to obtain the borrower's financial and hardship information and to determine if HAMP is appropriate. The servicer may not require a borrower to make an up-front cash contribution (other than the first trial period payment) for a borrower to be considered for HAMP.

As outlined in *Section 203, Letters (01/01/11)*, a servicer must send a first foreclosure prevention solicitation letter to the borrower 35 to 45 days after the payment due date, which must solicit the borrower for participation in HAMP and include the detail contained in the sample *Solicitation Letter* prepared by Fannie Mae (which includes Fannie Mae's logo). Should a servicer not receive a response from the borrower within 30 days of sending the solicitation letter for HAMP, the servicer should pursue other remedies, including foreclosure. A servicer should not delay sending a breach letter, when required, while awaiting a response from the borrower. Fannie Mae's approval of the servicer's foreclosure prevention solicitation letter is not required.

When discussing HAMP, the servicer should provide the borrower with information designed to help the borrower understand the modification terms that are being offered and the modification process. Such communication should help minimize potential borrower confusion, foster good customer relations, and improve legal compliance and reduce other risks in connection with the transaction. A servicer also must provide a borrower with clear and understandable written information about the material terms, costs, and risks of the modified mortgage loan in a timely manner to enable borrowers to make informed decisions. The servicer should inform the borrower during discussions that a modification under HAMP will cancel any assumption, variable or step-rate feature, or enhanced payment options (for example, Timely Payment Rewards®) in the borrower's existing mortgage loan, at the time the mortgage loan is modified.

Fannie Mae expects servicers to have adequate staffing, resources, and facilities for receiving and processing the HAMP documents and any requested information that is submitted by borrowers. Servicers must have procedures and systems in place to be able to respond to inquiries and complaints about HAMP. Servicers should ensure that such inquiries and complaints are provided fair consideration, and timely and appropriate responses and resolution.

VII, 610.04.02: Borrower Notices (06/01/10)

A mortgage loan is evaluated for HAMP when one of the following events has occurred:

- A borrower has submitted a written request (either hardcopy or electronic submission) for consideration for a HAMP modification that includes, at a minimum, current borrower income and a reason for default or explanation of hardship, as applicable.
- A borrower has been offered a trial period plan.

A servicer must send a written notice to every borrower that has been evaluated for HAMP but is not offered a trial period plan, is not offered a permanent HAMP modification, or is at risk of losing eligibility for HAMP because he or she has failed to provide required financial documentation. The notices must comply with all laws, rules, and regulations including, but not limited to, the Equal Credit Opportunity Act, applicable to the transaction.

When a borrower is evaluated for HAMP and the borrower is not offered a trial period plan or official HAMP modification, servicers are required to provide data specified in Schedule IV of Supplemental Directive 09-06 to Fannie Mae as Treasury's program administrator. The data reporting requirements in Schedule IV are designed to document the disposition of borrowers evaluated for HAMP.

Whenever a servicer is required to provide data specified in Schedule IV, the servicer must also send the appropriate Borrower Notice. With the exception of the Notice of Incomplete Information, all borrower notices must be mailed no later than 10 business days following the date of the servicer's determination that a trial period plan or official HAMP modification will not be offered. Borrower notices may be sent electronically only if the borrower has previously agreed to exchange correspondence relating to the modification with the servicer electronically.

The content of the notice will vary depending on the information intended to be conveyed or the determination made by the servicer. All notices must be written in clear, non-technical language, with acronyms and industry terms such as "NPV" explained in a manner that is easily understandable. The explanation(s) should relate to one or more of the model clauses specified in *Exhibit 2: Model Clauses for Borrower Notices*. Use of the model clauses is optional; however, they illustrate a level of specificity that is deemed to be in compliance with the requirements of this *Servicing Guide*.

Notice of Non-Approval

For borrowers not approved for a HAMP modification, this notice must provide the primary reason or reasons for the non-approval. The notice must also describe other foreclosure prevention alternatives for which the borrower may be eligible, if any, including but not limited to other modification programs, preforeclosure sale, or deed-in-lieu of foreclosure, and identify the steps the borrower must take in order to be considered for those alternatives. If the servicer has already approved the borrower for another foreclosure prevention alternative, information necessary to participate in or complete the alternative should be included. The notice should be clear that the borrower was considered for but is not eligible for HAMP.

When the borrower is not approved for a HAMP modification because the mortgage loan is deemed NPV negative, the notice must include a list of certain input fields that are considered to reach the NPV result and a statement that the borrower may, within 30 calendar days of the date of the notice, request the date the NPV test was completed and the values used to populate the NPV input fields. The purpose of providing this information is to allow the borrower the opportunity to correct values that may have impacted the analysis of the borrower's eligibility.

If the borrower (or the borrower's authorized representative) requests the specific NPV values orally or in writing within 30 calendar days from the date of the notice, the servicer must provide them to the borrower within 10 calendar days of the request. If the mortgage loan is scheduled for foreclosure sale when the borrower requests the NPV values, the servicer may not complete the foreclosure sale until 30 calendar days after the servicer delivers the NPV values to the borrower. This will allow the borrower time to make a request to correct any values that may have been inaccurate.

Upon receipt of written evidence from the borrower indicating that one or more of the NPV values is inaccurate, the servicer must verify the evidence and, if accurate, must re-run the NPV calculation if the correction is material and is likely to change the NPV outcome. Values that are not affected by the correction do not need to be changed from the first NPV calculation. If the borrower identifies

inaccuracies in the NPV values, the servicer must suspend the foreclosure sale until the inaccuracies are reconciled. Servicers are not required to provide the numeric NPV results or NPV input values not enumerated in *Exhibit 1: NPV Versioning Requirements*.

Notice of Payment Default During the Trial Period Plan

The servicer must inform the borrower that he or she failed to make a trial period payment by the end of the month in which such trial period payment was due and is in default. The notice must also describe other foreclosure prevention alternatives for which the borrower may be eligible, if any, including but not limited to other modification programs, preforeclosure sale, or deed-in-lieu of foreclosure, and identify the steps the borrower must take in order to be considered for these alternatives. If the servicer has already approved the borrower for another foreclosure alternative, information necessary to participate in or complete the alternative should be included. The notice should be clear that the borrower was considered for but is not eligible for HAMP.

Notice of Mortgage Loan Pay-Off or Reinstatement

To confirm that the mortgage loan was paid off or reinstated, the servicer must provide notice, which includes the payoff or reinstatement date. If the mortgage loan was reinstated, this notice must include a statement that the borrower may contact the servicer to request reconsideration under HAMP if he or she experiences a subsequent financial hardship.

Notice of Withdrawal of Request or Non-Acceptance of Offer

The servicer must confirm that the borrower withdrew the request for consideration for a HAMP modification or did not accept either a trial period plan or a HAMP modification offer. Failure to make the first trial period payment in a timely manner is considered non-acceptance of the trial period plan.

Incomplete Information Notice

If the servicer receives an incomplete Initial Package or needs additional documentation to verify the borrower's eligibility and income, the servicer must send the borrower an Incomplete Information Notice. A list of all the financial documents needed to complete the HAMP evaluation and a date by which the information must be received, which must be no less than 30 calendar days from the date of the notice, before the borrower becomes ineligible for HAMP must be included in an Incomplete Information Notice. If the documents are not received by the date specified in the notice, the servicer must attempt at least three phone calls to the borrower between the 5th and 15th day after the solicitation is mailed, send a follow-up letter on the 15th day, which should again include a list of all financial documents needed to complete the HAMP evaluation and a date by which the information must be received, which must be no less than 15 calendar days from the date of the second notice, and attempt three phone calls between the 15th and 30th day. If the borrower fails to provide all required verification documents by the date provided in the second notice, the servicer will declare the borrower ineligible for a modification and send the borrower a Non-Approval Notice.

All notices must also include the following:

- a toll-free number through which the borrower can reach a servicer representative capable of providing specific details about the contents of the borrower notice and reasons for a non-approval determination;
- the Homeowner's HOPE™ Hotline number (888-995-HOPE 888-995-HOPE ™), with an explanation that the borrower can seek assistance at no charge from HUD-approved housing counselors and can request assistance in understanding the notice by asking for MHA HELP; and
- any information, disclosures, or notices required by the borrower's mortgage documents and applicable federal, state, and local law.

VII, 610.04.03: Document Retention (06/01/10)

Servicers must retain all documents and information received during the process of determining borrower eligibility, including borrower income verification, total monthly mortgage payment and total monthly gross debt payment calculations, NPV calculations (NPV model and version used, assumptions, inputs, and outputs), evidence of application of each step of the modification waterfall, escrow analysis, escrow advances, and escrow set-up. The servicers must retain all documents and information related to the monthly payments during and after the trial period as well as the incentive payment calculations and such other required documents.

Servicers must retain detailed records of borrower solicitations or borrower-initiated inquiries regarding HAMP, the outcome of the evaluation for modification under HAMP, and specific justification with supporting details if the request for modification under HAMP was denied. Records must also be retained to document the reason(s) that a trial period plan is not finalized. If a borrower under a HAMP modification loses good standing, the servicer must retain documentation of its consideration of the borrower for other foreclosure prevention alternatives. Servicers must retain HAMP documentation as prescribed in Part I, Section 405: Record Retention, or for seven years from the date of document collection, whichever is later.

VII, 610.04.04: Temporary Suspension of Foreclosure Proceedings (04/21/09)

To ensure that a borrower currently at risk of foreclosure has the opportunity to apply for HAMP, servicers should not proceed with a foreclosure sale until the borrower has been evaluated for the program and, if eligible, an offer to participate in HAMP has been made. Servicers must use reasonable efforts to contact borrowers facing foreclosure to determine their eligibility for HAMP, including in-person contacts at the servicer's discretion. Servicers must not conduct foreclosure sales on mortgage loans previously referred to foreclosure or refer new mortgage loans to foreclosure during the 30-day period that the borrower has to submit documents evidencing an intent to accept the trial period plan offer. Except as noted herein, any foreclosure sale will be suspended for the duration of the trial period plan, including any period of time between the borrower's execution of the trial period plan and the Trial Period Plan Effective Date. However, borrowers in Georgia, Hawaii, Missouri, and Virginia will be considered to have failed the trial period if they are not current under the terms of the trial period plan as of the date that the foreclosure sale is scheduled. Accordingly, servicers of HAMP loans secured by properties in these states must proceed with the foreclosure sale if the borrower has not made the trial period payments required to be made through the end of the month preceding the month in which the foreclosure sale is scheduled to occur.

VII, 610.04.05: Mortgage Insurer Approval (04/21/09)

Fannie Mae has obtained blanket delegations of authority from most mortgage insurers so that servicers can more efficiently process HAMP modifications without having to obtain mortgage insurer approval on individual mortgage loans. A list of the mortgage insurers from which Fannie Mae has received a delegated authority agreement can be found on eFannieMae.com. If applicable, servicers must continue to obtain mortgage insurer approval on a case-by-case basis from any mortgage insurer for which Fannie Mae has not yet received a delegated authority agreement. Servicers should consult their mortgage insurance providers for specific processes related to the reporting of modified terms, payment of premiums, payment of claims, and other operational matters in connection with mortgage loans modified under HAMP.

VII, 610.04.06: Executing the HAMP Documents (06/01/10)

Servicers must use a two-step process for HAMP modifications. Step 1 involves providing a document outlining the terms of the forbearance (the *Trial Period Plan Notice*), and step 2 involves providing the borrower with a separate document (the Agreement) outlining the terms of the modification.

Step 1: A servicer shall require a borrower to submit the required documentation, the Initial Package, to verify the borrower's eligibility and income prior to sending the borrower a *Trial Period Plan Notice*.

The servicer should use the *HAMP Documentation Request Letter* to obtain the Initial Package from the borrower. The servicer should instruct the borrower to return the Initial Package within 30 days from the date the *HAMP Documentation Request Letter* is sent by the servicer.

Within 10 business days following receipt of an Initial Package, the servicer must acknowledge, in writing, the borrower's request for HAMP participation by sending the borrower confirmation that the Initial Package was received, and a description of the servicer's evaluation process and timeline. If the Initial Package is received from the borrower via e-mail, the servicer may e-mail the acknowledgment. Servicers must maintain evidence of the date of receipt of the borrower's Initial Package in its records.

Within 30 calendar days from the date an Initial Package is received, the servicer must review the documentation provided by the borrower for completeness. If the documentation is incomplete, the servicer must send the borrower an Incomplete Information Notice in accordance with the guidance set forth in *Section 610.04.02, Borrower Notices (06/01/10)*, under "Incomplete Information Notice.". If the borrower's documentation is complete, the servicer must either:

- send the borrower a *Trial Period Plan Notice*; or
- make a determination that the borrower is not eligible for HAMP and communicate this determination to the borrower in accordance with *Section 610.04.02, Borrower Notices (06/01/10)*.

The written communication sent within 10 days of receipt of a borrower's request for HAMP participation may also include, at the servicer's discretion, the results of its review of the Initial Package.

Servicers must retain a copy of the *Trial Period Plan Notice* in the mortgage loan file and note the date that it was sent to the borrower. Receipt of the first trial period payment under the *Trial Period Plan Notice* on or before the last day of the month in which the first payment is due will be deemed as evidence of the borrower's acceptance of the trial period plan and its terms and conditions. The effective date of the trial period will be set forth in the trial period plan and is the first day of the month in which the first trial period plan payment is due.

The servicer is encouraged to contact the borrower before the last day of the month in which the first trial period plan payment is due if the borrower has not yet responded to encourage submission of the payment. The servicer may, at its discretion, consider the offer of a trial period plan to have expired if the borrower has not submitted payment as required above.

HAMP program guidelines require that, unless a borrower or co-borrower is deceased or borrower and co-borrower are divorced, all parties who sign the original note OR the security instrument, or their duly authorized representative, must sign the HAMP documents. In cases where a borrower and co-borrower are unmarried and either borrower or co-borrower relinquish all rights to the property securing the mortgage loan through a recorded quitclaim deed, the non-occupying borrower that has relinquished property rights is not required to provide income documentation or to sign the HAMP documents but remains liable for the outstanding mortgage debt.

Servicers may encounter circumstances where a co-borrower signature is not obtainable, for reasons such as mental incapacity, military deployment, or contested divorce. When a co-borrower's signature is

not obtainable and the servicer decides to continue with the HAMP modification, the servicer must appropriately document the basis for the exception in the servicing records.

Step 2: The borrower must be current under the terms of the trial period plan at the end of the trial period to receive a permanent loan modification. "Current" in this context is defined as the borrower having made each required trial period payment by the last day of the month in which it is due. Borrowers who fail to make current trial period payments are considered to have failed the trial period and are not eligible for a HAMP modification. Servicers are instructed to use good business judgment in determining whether trial period payments were received timely or if mitigating circumstances caused the payment to be late. Exceptions should be documented in the servicing records.

Servicers must calculate the terms of the modification using verified income, taking into consideration amounts to be capitalized during the trial period. Servicers are encouraged to send the Agreement for execution by the borrower after receipt of the second payment under the trial period (or third payment for mortgage loans facing imminent default, which require a four-month trial period).

Acceptable Revisions to HAMP Documents

Servicers must use the *Home Affordable Modification Agreement* (Form 3157) and are strongly encouraged to use the other HAMP documents provided on eFannieMae.com. The Home Affordable Modification Agreement can only be modified as authorized in its document summary.

Should a servicer decide to revise one of the other HAMP documents or draft its own HAMP documents, it must obtain prior written approval from Fannie Mae with the exception of the following circumstances:

- The servicer must revise the HAMP documents as necessary to comply with Federal, state, and local law. For example, in the event that HAMP results in a principal forbearance, servicers are obligated to modify the uniform instrument to comply with laws and regulations governing balloon disclosures.
- Fannie Mae's approval is not required for the servicer's foreclosure prevention solicitation letter, which must solicit the borrower for participation in HAMP and include the detail contained in the sample *Solicitation Letter* prepared by Fannie Mae.
- The servicer may include, as necessary, conditional language in HAMP offers and modification agreements that condition the implementation of any modification on the servicer's receipt of an acceptable title endorsement, or similar title insurance product, as necessary, to ensure that the modified mortgage loan retains its first-lien position and is fully enforceable.
- If the borrower previously received a Chapter 7 bankruptcy discharge but did not reaffirm the mortgage debt under applicable law, the following language must be inserted in Section 1 of the *Trial Period Plan Notice* and Section 1 of the Agreement: "I was discharged in a Chapter 7 bankruptcy proceeding subsequent to the execution of the Loan Documents. Based on this representation, Lender agrees that I will not have personal liability on the debt pursuant to this Agreement."
- The servicer may include language in the *Trial Period Plan Notice* providing instructions for borrowers who elect to use an automated payment method to make trial period payments.

Use of Electronic Records

Electronic documents and signatures for HAMP (other than for Form 4506-T and Form 4506T-EZ) are acceptable as long as the electronic record complies with all requirements of the *Selling and Servicing Guides* and applicable law.

Assignment to MERS

If the original mortgage loan was registered with MERS and MERS was named as the original mortgagee of record, (as nominee for the lender), the servicer MUST make the following changes to the Agreement:

- Insert a new definition under the "Property Address" definition on page 1, which reads as follows:

  "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for lender and lender's successors and assigns. MERS is the mortgagee under the Mortgage. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, (888) 679-MERS (888) 679-MERS .
- Add as section 4.I:

  That MERS holds only legal title to the interests granted by the borrower in the mortgage, but, if necessary to comply with law or custom, MERS (as nominee for lender and lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of lender including, but not limited to, releasing and canceling the mortgage loan.
- MERS must be added to the signature lines at the end of the Agreement, as follows:

  _____
  Mortgage Electronic Registration
  Systems, Inc. – Nominee for Lender

The servicer may execute the Agreement on behalf of MERS and, if applicable, submit it for recordation.

VII, 610.04.07: Trial Payment Period (06/01/10)

The servicer must service the mortgage loan during the trial period in the same manner as it would service a mortgage loan in forbearance. During the trial period for MBS mortgage loans, the mortgage loan will remain in the related MBS pool and the servicer must continue to service the mortgage loan under Fannie Mae's standard guidelines applicable to MBS mortgage loans. (Refer to *Section 610.04.09, Reclassification or Removal of MBS Mortgage Loans Prior to Effective Date of Modification (03/01/10).*)

A borrower's trial period starts on the Trial Period Plan Effective Date, which is a field in the *Trial Period Plan Notice* that is completed by the servicer. The effective date is based on the date the servicer mails the *Trial Period Plan Notice* to the borrower. If the servicer mails the *Trial Period Plan Notice* to the borrower on or before the 15th day of a calendar month, then the servicer must insert the first day of the next month as the Trial Period Plan Effective Date. If the servicer mails the *Trial Period Plan Notice* to the borrower after the 15th day of a calendar month, the servicer must use the first day of the month after the next month as the Trial Period Plan Effective Date. The date of the *Trial Period Plan Notice* will be used to verify the Trial Period Plan Effective Date. For example, if the servicer mails the *Trial Period Plan Notice* to the borrower on June 2nd, the servicer should use July 1st as the Trial Period Plan Effective Date. If the servicer mails the *Trial Period Plan Notice* to the borrower on June 27th, the servicer should use August 1st as the Trial Period Plan Effective Date.

The trial payment period is three months long for mortgage loans where the payment is already in default and four months long for mortgage loans where the servicer has determined that a borrower's payment default is imminent but no default has occurred. The borrower must be current under the terms of the trial period plan at the end of the trial period in order to receive a permanent modification. "Current" in this context is defined as the borrower having made each required trial period payment by the last day of the month in which it is due. Borrowers who fail to make current trial period payments are considered to have failed the trial period and are not eligible for a HAMP modification.

The date that the first trial period payment is due under the terms of the trial period plan must be the same date as the Trial Period Plan Effective Date. The servicer must receive the borrower's first trial period payment on or before the last day of the month in which the Trial Period Plan Effective Date occurs ("Trial Period Offer Deadline"). The servicer must consider the trial period plan offer to have expired if the servicer does not receive the borrower's first trial period payment by the Trial Period Offer Deadline.

Although the borrower may make scheduled payments earlier than expected, under HAMP, the length of the Trial Period is set forth in the applicable trial period plan, and such payments may not result in acceleration of the modification effective date. There is no variation to this rule.

Borrowers who file bankruptcy during the trial period, but who make all of the required payments in a timely fashion and are otherwise in compliance with the trial period plan, remain eligible for a modification provided all of the representations in Section 1 of the trial period plan remain true. The servicer and its bankruptcy counsel must work with the borrower and the borrower's bankruptcy counsel to obtain any required court approvals of the modification. A borrower actively involved in a bankruptcy proceeding prior to being placed in HAMP is eligible for HAMP at the servicer's discretion. If a servicer provides an offer under HAMP to a borrower that is involved in an active bankruptcy case, the servicer must work with the borrower or borrower's counsel to obtain all necessary approvals from the bankruptcy court.

For a borrower facing imminent default, the borrower's payment during the trial period must not be equal to or greater than the contractual mortgage payment in effect prior to the trial period.

If the Agreement is fully executed and the borrower complies with the terms and conditions of the trial period plan, the loan modification will become effective on the first day of the month following the trial period as specified in the *Trial Period Plan Notice* and the Agreement. The servicer may, at its option, complete the Agreement such that the modification becomes effective on the first day of the second month *following* the final trial period month to allow for sufficient processing time. In either instance, the modification effective date and the due date for the first payment under the Agreement must be the same date. A servicer must treat all borrowers the same in applying this option by selecting, at its discretion and evidenced by a written policy, the date by which the final trial period payment must be submitted before the servicer applies this option ("cutoff date"). The cutoff date must be after the due date for the final trial period payment set forth in Section 2 of the *Trial Period Plan Notice*.

If the servicer elects this option, the borrower will not be required to make an additional trial period payment during the month (the "interim month") in between the final trial period month and the month in which the modification becomes effective. For example, if the last trial period month is March and the servicer elects the option described above, the borrower is not required to make any payment during April, and the modification becomes effective, and the first payment under the Agreement is due, on May 1st.

Neither the borrower nor the servicer will be entitled to accrue incentive compensation for the interim month if the borrower does not make a trial period payment during the interim month. The servicer must modify the *Home Affordable Modification Agreement Cover Letter* to inform the borrower about (i) the delay of the modification effective date by one month and (ii) the effects of the interim month and the delay in the effective date of the Agreement, including, but not limited to, the delay in the effective date of the modified interest rate, the increase in the delinquent interest capitalized, and the loss of one month's accrual of the incentive payment if the borrower does not make an additional trial period payment.

If a servicer has information that the borrower does not meet all of the eligibility criteria for HAMP (for example, because the borrower has moved out of the house), the servicer should explore other foreclosure prevention alternatives prior to resuming or initiating foreclosure.

VII, 610.04.08: Use of Suspense Accounts and Application of Payments (04/21/09)

In accordance with *Part III, Section 102.06, Pending Modifications*, and, if permitted by the applicable mortgage loan documents, servicers may accept and hold as "unapplied funds" (held in a T&I custodial account) amounts received which do not constitute a full monthly, contractual PITI payment. However, when the total of the reduced payments held as "unapplied funds" is equal to a full PITI payment, the servicer is required to apply all full payments to the mortgage loan.

Any unapplied funds remaining at the end of the trial payment period which do not constitute a full monthly, contractual PITI payment should be applied to reduce any amounts that would otherwise be capitalized onto the principal balance.

VII, 610.04.09: Reclassification or Removal of MBS Mortgage Loans Prior to Effective Date of Modification (03/01/10)

For an MBS mortgage loan to be eligible for reclassification from an MBS pool for the purpose of modification, the mortgage loan must have been in a continuous state of delinquency for at least four consecutive monthly payments (or at least eight consecutive payments in the case of a biweekly mortgage loan) without a full cure of the delinquency.

A delinquent MBS mortgage loan that is serviced under the special servicing option or a shared-risk MBS pool for which Fannie Mae markets the acquired property generally will be removed from its MBS pool in accordance with Fannie Mae's procedures for automatic reclassification of delinquent MBS mortgage loans as portfolio mortgage loans.

For MBS mortgage loans that are not subject to Fannie Mae's automatic reclassification process, Fannie Mae will select for reclassification those mortgages that are part of an MBS pool that are serviced under the special servicing option or a shared-risk MBS pool for which Fannie Mae markets the acquired property and that are reported through HSSN as having made all of the required HAMP trial period payments in the final month of the trial period. Thus, during the trial period it is very important that servicers timely report to Fannie Mae the receipt of funds from the borrower.

Reclassification of MBS Mortgage Loans – Imminent Default

For mortgage loans from MBS pools where the servicer has determined that a borrower's payment default is imminent and thus requiring four trial period payments, reclassifications are subject to the following:

- As long as the borrower has made the fourth payment and the servicer has accepted the payment and notified Fannie Mae of receipt of the payment before the servicer's reclassification date in the fourth month of the trial period, Fannie Mae will reclassify the mortgage loan during the fourth month of the trial period.
- If, prior to the close of the servicer's reclassification date in the fourth month, (i) the borrower has not made the fourth payment, or (ii) the servicer has not applied the fourth payment and notified Fannie Mae that the payment has been made, then it will not be possible to reclassify the loan from the MBS pool prior to the modification effective date. In the event that the fourth trial period payment is received after the 15th calendar day (i.e., servicer's reclassification date) of the fourth month of the trial period but before the end of the trial period, the servicer must extend the trial period by one month.

Reclassification of MBS Mortgage Loans – Payment in Default

For any MBS mortgage loan that already has a payment in default at the time HAMP is negotiated and three trial period payments are required, reclassifications are subject to the following:

- As long as the borrower has made the third payment and the servicer has accepted the payment and notified Fannie Mae of receipt of the payment before the servicer's reclassification date in the third month of the trial period, Fannie Mae will reclassify the mortgage loan during the third month of the trial period.
- If, prior to the close of the servicer's reclassification date in the third month, (i) the borrower has not made the third payment, or (ii) the servicer has not applied the third payment and notified Fannie Mae that the payment has been made, then it will not be possible to reclassify the loan from the MBS pool prior to the modification effective date. In the event that the third trial period payment is received after the 15th calendar day (i.e., servicer's reclassification date) of the third month of the trial period but before the end of the trial period, the servicer must extend the trial period by one month.

Conditions of Modification

If the required trial period payments are not made by the end of the trial period, the preconditions to make the modification effective will not have been satisfied and Fannie Mae will cancel the case. The servicer must ensure that the loan modification is not implemented.

Modification agreements must be signed by an authorized representative of the servicer, must reflect the actual date of signature by the servicer's representative, and the signature must not occur until after the mortgage loan has been removed from the MBS pool, and reclassified as a Fannie Mae portfolio mortgage loan. Additionally, payments received should only be applied in accordance with the modified terms once the servicer has confirmed that Fannie Mae has reclassified the mortgage loan. Servicers can confirm that Fannie Mae has reclassified a mortgage loan by reviewing the Purchase Advice that is posted on SURF.

After a mortgage loan is reclassified, the servicer will follow the existing procedure and update the Officer Signature Date in HSSN to close the modification.

A current MBS mortgage loan is ineligible for reclassification for the purpose of modifying the mortgage loan.

Removal of Regular Servicing Option MBS Mortgage Loans

Servicers of regular servicing option MBS mortgage loans are encouraged to offer HAMP for these mortgage loans. If a servicer decides to use HAMP for such mortgage loans, the servicer will be expected to follow the Treasury's Home Affordable Modification Program, sign the *Servicer Participation Agreement*, obtain any third-party approvals, and comply with the requirements of this *Servicing Guide* governing reporting and removal of these mortgage loans from MBS pools, if applicable. Fannie Mae is not responsible for any losses or expenses the servicer incurs and will not pay borrower or servicer incentive fees for these mortgage loans which are not considered Fannie Mae HAMP mortgage loans.

The servicer of a mortgage loan that is part of a regular servicing option MBS pool or part of a shared-risk special servicing option MBS pool for which the servicer's shared risk liability has not expired must not modify the mortgage loan as long as it remains in the MBS pool. The servicer must purchase the mortgage loan from the MBS pool upon completion of the trial period provided the mortgage loan has been in a continuous state of delinquency for at least four consecutive monthly payments (or at least eight consecutive payments in the case of a biweekly mortgage loan) without a full cure of the delinquency. Regular servicing option MBS mortgage loans and such shared-risk special servicing option MBS mortgage loans that have been purchased from an MBS pool for purposes of modification are not eligible for redelivery to Fannie Mae. Performing MBS mortgage loans (that is, those that do not meet the delinquency criteria described above) are ineligible for repurchase for the purpose of modifying the mortgage loan.

VII, 610.04.10: Recording the Modification (12/14/09)

For all mortgage loans that are modified pursuant to HAMP, the servicer must ensure that the modified mortgage loan retains its first-lien position and is fully enforceable. The Agreement must be executed by the borrower(s) and, in the following circumstances, must be in recordable form:

- if state or local law requires a modification agreement be recorded to be enforceable;
- if the property is located in the State of New York or Cuyahoga County, Ohio;
- if the amount capitalized is greater than $50,000 (aggregate capitalized amount of all modifications of the mortgage loan completed under Fannie Mae's mortgage modification alternatives);
- if the final interest rate on the modified mortgage loan is greater than the pre-modified interest rate in effect on the mortgage loan;
- if the remaining term on the mortgage loan is less than or equal to ten years and the servicer is extending the term of the mortgage loan more than ten years beyond the original maturity date; or
- if the servicer's practice for modifying mortgage loans in the servicer's portfolio is to create modification agreements in recordable form.

In addition, to retain the first-lien position, servicers must:

- ensure that all real estate taxes and assessments that could become a first lien are current, especially those for manufactured homes taxed as personal property, personal property taxes, condominium/HOA fees, utility assessments (such as water bills), ground rent and other assessments;
- obtain a title endorsement or similar title insurance product issued by a title insurance company if the amount capitalized is greater than $50,000 (aggregate capitalized amount of all modifications of the mortgage loan completed under Fannie Mae's mortgage modification alternatives); or if the final interest rate on the modified mortgage loan is greater than the interest rate in effect prior to modification of the mortgage loan; and
- record the executed Agreement if (1) state or local law requires the modification agreement be recorded to be enforceable; (2) the property is located in Cuyahoga County, Ohio; (3) the amount capitalized is greater than $50,000 (aggregate capitalized amount of all modifications of the mortgage loan completed under Fannie Mae's modification alternatives); (4) the final interest rate on the modified mortgage loan is greater than the interest rate in effect prior to modification of the mortgage loan; or (5) the remaining term on the mortgage loan is less than or equal to ten years and the servicer is extending the term of the mortgage loan more than ten years beyond the original maturity date.

VII, 610.04.11: Program Waivers (11/02/09)

From time to time, temporary program waivers related to HAMP are posted on HMPadmin.com. Such waivers are applicable to Fannie Mae servicers, and as such, Fannie Mae servicers must ensure compliance with the terms of such waivers.

VII, 610.05: Monthly Statements (04/21/09)

For modifications that include principal forbearance, servicers are encouraged to include the amount of the gross UPB on the borrower's monthly payment statement. In addition, the borrower should receive information on a monthly basis regarding the accrual of "pay-for performance" principal balance reduction payments.

VII, 610.06: Redefault and Loss of Good Standing (04/21/09)

If, following a successful trial period, a borrower defaults on a loan modification executed under HAMP (three monthly payments are due and unpaid on the last day of the third month), the mortgage loan is no longer considered to be in "good standing." Once lost, good standing cannot be restored even if the borrower subsequently cures the default. A mortgage loan that is not in good standing is not eligible to receive borrower or servicer incentives and reimbursements and these payments will no longer accrue for that mortgage loan. Further, the mortgage loan is not eligible for another HAMP modification.

In the event a borrower defaults, the servicer must work with the borrower to cure the modified loan, or if that is not feasible, evaluate the borrower for any other available foreclosure prevention alternatives prior to commencing foreclosure proceedings.

VII, 610.07: Servicer Delegation, Duties, and Responsibilities (04/21/09)

All servicers are eligible to participate in HAMP without obtaining prior approval from Fannie Mae.

In performing the duties incident to the servicing of mortgage loans modified under HAMP, a servicer must:

- Collect and record the details of all executed mortgage modifications, including, but not limited to: the original terms of the modified mortgage loan; the modified terms of the modified mortgage loan; data supporting the modification decision; updates to payoff information and the last payment date; and additional information and data as may be requested by Fannie Mae from time to time. All such data must be compiled and reported to Fannie Mae in the form and manner set forth in this *Servicing Guide*.
- Retain all data, books, reports, documents, audit logs, and records, including electronic records, related to HAMP. In addition, the servicer shall maintain a copy of all computer systems and application software necessary to review and analyze any electronic records. Unless otherwise directed by Fannie Mae, the servicer shall retain these records for mortgage loans owned or securitized by Fannie Mae in accordance with *Part I, Section 405, Record Retention*, or for such longer period as may be required pursuant to applicable law.
- Construe the terms of this *Servicing Guide* and any related instructions from the Treasury or Fannie Mae in a reasonable manner to serve the purposes and interests of the United States.
- Use any nonpublic information or assets of the United States or Fannie Mae received or developed in connection with HAMP solely for the purposes of fulfilling its obligations hereunder.
- Comply with all lawful instructions or directions received from the Treasury and Fannie Mae.
- Develop, enforce, and review for effectiveness at least annually, an internal control program designed to ensure effectiveness of duties in connection with HAMP and compliance with this *Servicing Guide*, to monitor and detect loan modification fraud, and to monitor compliance with applicable consumer protection and fair lending laws. The internal control program must include documentation of the control objectives for HAMP activities, the associated control techniques, and mechanisms for testing and validating the controls.
- Provide Fannie Mae with access to all internal control reviews and reports that relate to duties performed under HAMP by the servicer and/or its independent auditing firm.
- Supervise and manage any contractor that assists in the performance of services in connection with HAMP. A servicer shall remove and replace any contractor that fails to perform and ensure that all of its contractors comply with the terms and provisions of this *Servicing Guide*. A servicer shall be responsible for the acts or omissions of its contractors as if the acts or omissions were those of the servicer.

VII, 610.08: Reporting Requirements (06/01/10)

Servicers must comply with the following mortgage loan reporting requirements for all Fannie Mae mortgage loans.

VII, 610.08.01: Reporting to Fannie Mae (06/01/10)

For all Fannie Mae portfolio mortgage loans and MBS mortgage loans guaranteed by Fannie Mae (including lender recourse loans), a servicer must enter loan-level HAMP data by submitting a delegated case into HSSN when a servicer has received the borrower's Initial Package, including the RMA, the Form 4506-T or 4506T-EZ, and income documentation, and determined that the borrower is eligible for a HAMP modification. Additionally, the servicer must record in HSSN receipt of the trial period payments due under the plan. The servicer must use HSSN to request reclassification for MBS mortgage loans as outlined in the Reclassification or Removal of MBS Mortgage Loans Prior to Effective Date of Modification section when appropriate. The servicer must represent and warrant that, after application of all trial payments made by the borrower, once the sum of payments total a full payment, the borrower has been in a delinquent status (that is, not current in contractual payments) on each of the last four monthly payment due dates and continues to be delinquent. After a mortgage loan is reclassified, if applicable, the servicer will follow the existing procedure and update the Officer Signature Date in HSSN to close the modification.

Existing monthly Loan Activity Record (LAR) reporting requirements for Fannie Mae servicers will not change. Servicers must continue to report the standard LAR format for loan payment by the 3rd business day and for payoff activity by the 2nd business day of each month for the prior month's activity (for example, payoff reporting to be received by April 2nd will contain March activity).

Servicers should report post-modification UPB once the modification is closed in HSSN (for example, if modification is closed on March 25, post-modification balances should be reported on the April 3rd LAR). If the servicer submits a LAR to report post-modification balances before the case is closed in HSSN, an exception will occur.

If the pre-modification UPB, or the pre-modification last paid installment (LPI), reported in HSSN for the closed modification does not agree with the pre-modification UPB, or the pre-modification LPI, in Fannie Mae's investor reporting system, the loan modification will not be processed in Fannie Mae's investor reporting system until the discrepancy is resolved.

If, in the final month of the trial period, the sum of unapplied trial period payments is equal to or greater than a full contractual payment, and the loan modification is closed in the same month, the servicer must report the contractual payment before the post modification balances can be reported. This will require two Loan Activity Records and two reporting cycles to complete.

If the modification includes principal forbearance, the servicer should report the net UPB (full UPB minus the forbearance amount) in the "Actual UPB" field on both LARs for the reporting month that the modification becomes effective. The initial reduction in UPB caused by the principal forbearance should not be reported to Fannie Mae as a principal curtailment. The interest reported on the LAR must be based on the net UPB.

If the modification includes principal forbearance resulting in a balloon payment due upon borrower's sale of the property or payoff, or maturity of the mortgage loan, interest must never be computed on the principal forbearance amount, including at the time of liquidation. When reporting a payoff or repurchase of the mortgage loan, the principal reported on the LAR must include the principal forbearance amount. Attempting to report a payoff or repurchase without including the principal forbearance amount will generate an exception upon submission of the LAR.

If a principal curtailment is received on a mortgage loan that has a principal forbearance, servicers are instructed to apply the principal curtailment to the interest-bearing UPB. If, however, the principal curtailment amount is greater than or equal to the interest-bearing UPB, then the curtailment should be applied to the principal forbearance portion. If the curtailment satisfies the principal forbearance portion, any remaining funds should then be applied to the interest-bearing UPB.

Delinquency Status Reporting

The servicer must report a delinquency status code 09 – Forbearance – during the trial period. The servicer must then report a delinquency status code 28 – Mortgage Modification – to indicate that the delinquency status has changed once the borrower has successfully completed the trial period and the modification becomes effective, if applicable.

In the event that the borrower files bankruptcy during the trial period, servicers must continue to report delinquency status code 09 – Forbearance, until the borrower either successfully completes the trial period, in which case the status code would be changed to reflect 28 – modification, or the borrower fails the trial period, in which case the status code would be changed to reflect the appropriate bankruptcy status code.

VII, 610.08.02: Reporting to Treasury (03/01/10)

In addition to reporting to Fannie Mae, each servicer must report periodic HAMP loan activity to Treasury through the servicer web portal accessible through HMPadmin.com. Data should be reported by a servicer at the start of the modification trial period and during the modification trial period, for loan setup of the approved modification, and monthly after the modification is set up. Servicers will be required to submit three separate data files. Detailed guidelines for submitting these data files and a list of data elements for each report are available at HMPadmin.com.

The servicer should begin trial period reporting once the servicer receives the borrower's first trial period payment (as long as that payment is received by the servicer on or before the Trial Period Offer Deadline). This data must be submitted to the HAMP reporting system in accordance with the reporting requirements available at HMPadmin.com no later than the fourth business day of the month immediately following the month in which the Trial Period Plan Effective Date occurs. For example, if the Trial Period Plan Effective Date is July 1st and the servicer receives the borrower's first trial period payment on or before July 31st (including payments received by the servicer prior to July 1st), the servicer must report to Fannie Mae the trial period setup attributes by the fourth business day of August.

The servicer should report the length of the trial period on the loan setup record, excluding the interim month if the borrower does not make an additional trial period payment, and including the interim month if the borrower does make an additional trial period payment. **Note**: The effects of the interim month and attendant capitalization on the terms of the modification agreement may not alter the servicer's previous determination of the borrower's eligibility.

A one-time loan setup is required to establish the approved modified HAMP loan on Treasury's system. The servicer is required to submit the loan modification setup attributes to the HAMP reporting system no later than the fourth business day of the month in which the modification is effective. For example, if a modification is effective as of September 1st, the servicer must submit the loan setup attributes no later than the fourth business day of September. This new reporting time period is effective immediately.

The month after the loan setup file is provided, servicers must begin reporting activity to Treasury on all HAMP loans on a monthly basis (for example, loan setup file is provided in July, the first Loan Activity Record is due in August for July activity). The monthly reporting data elements are available on HMPadmin.com. The HAMP Loan Activity Record (LAR) is due by the 4th business day each month.

Servicers must refer to Supplemental Directive 09-06, *Home Affordable Modification Program – Data Reporting Requirements Guidance*, accessible on HMPadmin.com, to obtain more detailed information on the required data elements and reporting time frames for additional data elements that are required to be reported monthly.

A servicer will receive a username and password for the servicer web portal upon submission of a *HAMP Registration Form*. All servicers will be required to provide the *HAMP Registration Form* with information such as contact information and banking instructions for deposits of compensation payments. The *HAMP Registration Form* is a one-time submission; however, after the initial form is submitted, a servicer may submit a new form to update existing information at any time.

VII, 610.08.03: Reporting to Mortgage Insurers (04/21/09)

Servicers must maintain their mortgage insurance processes and comply with all reporting required by the mortgage insurer for mortgage loans modified under HAMP. Servicers should consult with the mortgage insurer for specific processes related to the reporting of modified terms, payment of premiums, payment of claims, and other operational matters in connection with mortgage loans modified under HAMP. Servicers are required to report successful HAMP modifications and the terms of those modifications to the appropriate mortgage insurers, if applicable, within 30 days following the end of the trial period and in accordance with procedures that currently exist or may be agreed to between servicers and the mortgage insurers.

Maintenance of Mortgage Insurance

Servicers must include the mortgage insurance premium in the borrower's modified payment, and must ensure that any existing mortgage insurance is maintained. Among other things, the servicer must ensure that the mortgage insurance premium is paid. In addition, servicers must adapt their systems to ensure proper reporting of modified mortgage loan terms so as not to impair coverage for any existing mortgage insurance. For example, in the event that the modification includes principal forbearance, servicers must continue to pay the correct mortgage insurance premiums based on the gross UPB, including any principal forbearance amount, must include the gross UPB in their delinquency reporting to the mortgage insurer, and must ensure any principal forbearance does not erroneously trigger automatic mortgage insurance cancellation or termination.

VII, 610.08.04: Transfers of Servicing (04/21/09)

When a transfer of servicing includes mortgage loans modified under HAMP, Fannie Mae requires the transferor servicer to provide special notification to the transferee servicer. Specifically, the transferor servicer must advise the transferee servicer that mortgage loans modified under HAMP are part of the portfolio being transferred and must confirm that the transferee servicer is not only aware of the special requirements for these mortgage loans, but also agrees to assume the additional responsibilities associated with servicing these mortgage loans.

The transferee servicer must assume all of the responsibilities and duties of HAMP. However, the transferee servicer's assumption of these responsibilities, duties, and warranties will in no way release the transferor servicer from its contractual obligations related to the transferred mortgage loans. The two servicers will be jointly and severally liable to Fannie Mae for all warranties and for repurchase, all special obligations under agreements previously made by the transferor servicer or any previous servicer or servicer (including actions that arose prior to the transfer), and all reporting, compliance, and audit oversight related duties regarding the transferred mortgage loans.

VII, 610.08.05: Credit Bureau Reporting (04/21/09)

In accordance with *Section 209, Notifying Credit Repositories (11/01/04)*, the servicer should continue to report a full-file status report to the four major credit repositories for each mortgage loan under HAMP in accordance with the Fair Credit Reporting Act and credit bureau requirements as provided by the Consumer Data Industry Association (CDIA) on the basis of the following:

- For borrowers who are current when they enter the trial period, the servicer should report the borrower current but on a modified payment if the borrower makes timely payments by the 30th day of each trial period month at the modified amount during the trial period, as well as report the modification when completed.
- For borrowers who are delinquent when they enter the trial period, the servicer should continue to report in such a manner that accurately reflects the borrower's delinquency and workout status following usual and customary reporting standards, as well as report the modification when completed.

More detailed information on these reporting standards will be published by the CDIA. However, once a mortgage loan has been modified under HAMP, any Special Comment Code related to HAMP will no longer apply (should be BLANK) as the account has been brought current with the modification, and the borrower is no longer paying under a partial or modified payment agreement.

Full-file reporting means that the servicer must describe the exact status of each mortgage loan it is servicing as of the last business day of each month.

VII, 610.09: Fees and Compensation (04/21/09)

This section provides guidance to servicers on the fees and compensation under the HAMP process.

VII, 610.09.01: Servicing Fees (04/21/09)

During the trial period, servicing fees will continue to be earned by the servicer to the extent that the borrower payments equal a contractual full payment. When the HAMP modification becomes effective, the servicer will receive servicing fees based on Fannie Mae's existing fee schedule for modified mortgage loans in accordance with *Section 602.02, Modifying Conventional Mortgage Loans (04/21/09)*.

VII, 610.09.02: Late Fees (04/21/09)

All late charges, penalties, stop payment fees, or similar fees must be waived upon successful completion of the trial period.

VII, 610.09.03: Administrative Costs (11/02/09)

Servicers may not charge the borrower to cover the administrative processing costs incurred in connection with a HAMP. The servicer must pay any actual out-of-pocket expenses, such as any required notary fees, recordation fees, title costs, property valuation fees, credit report fees, or other allowable and documented expenses. Fannie Mae will reimburse the servicer for allowable out-of-pocket expenses. Servicers will not be reimbursed for the cost of the credit report(s).

To obtain reimbursement for any allowable administrative fees and costs incurred in connection with HAMP, the servicer should submit a *Cash Disbursement Request* (Form 571) to Fannie Mae. Only for mortgage loans considered under HAMP, Fannie Mae will waive the requirements that the claim equal a minimum amount of $500.00 or that the mortgage loan be at least 6 months delinquent. Only administrative fees and costs associated with HAMP should be included on the Form 571. In order for the administrative costs to be reimbursed, servicers must reference HAMP in the comments section on the Form 571. If Form 571 is submitted in hard copy, the servicer must write "HAMP" on the top of the form.

VII, 610.09.04: Incentive Compensation (04/21/09)

No incentives of any kind will be paid if (i) the servicer has not provided a *HAMP Registration Form* or HAMP loan setup data prior to the effective date of the modification, or (ii) the borrower's monthly payment ratio starts below 31 percent prior to the implementation of HAMP. The incentive compensation will only be paid for HAMP modifications that are based on the borrower's verified income. Each servicer must promptly apply or remit, as applicable, all borrower and investor compensation it receives with respect to any modified mortgage loan.

With respect to payment of any incentive that is predicated on at least a 6- percent reduction in the borrower's monthly mortgage payment, the reduction will be calculated by comparing the monthly mortgage payment used to determine eligibility (adjusted as applicable to include property taxes, hazard insurance, flood insurance, condominium association fees, and homeowners' association fees) and the borrower's payment under HAMP.

Servicer Incentive Compensation

A servicer will receive compensation of $1,000 for each completed modification under HAMP. In addition, if a borrower was current under the original mortgage loan, a servicer will receive an additional compensation amount of $500. All such servicer incentive compensation shall be earned and payable once the borrower successfully completes the trial payment period.

If a borrower's monthly mortgage payment (principal, interest, taxes, and all related property insurance and homeowners' or condominium association fees, but excluding mortgage insurance) is reduced through HAMP by 6 percent or more, a servicer will also receive an annual "pay for success" fee equal to the lesser of: (i) $1,000 ($83.33 per month), or (ii) one-half of the reduction in the borrower's annualized monthly payment, for up to three years as long as the mortgage loan is a performing loan modification. The "pay for success" fee will be payable annually for each of the first three years after the anniversary of the month in which a trial period plan is effective. If and when the mortgage loan ceases to be in good standing, the servicer will cease to be eligible for any further incentive payment after that time, even if the borrower subsequently cures his or her delinquency. The servicer will forfeit any incentive payments that have accrued during the previous twelve months.

Borrower's Incentive Compensation

To provide an additional incentive for borrowers to keep their modified mortgage loan current, borrowers whose monthly mortgage payment (principal, interest, taxes, and all related property insurance and homeowners' or condominium association fees, but excluding mortgage insurance) is reduced through HAMP by 6 percent or more and who make timely monthly payments will earn an annual "pay for performance" principal balance reduction payment equal to the lesser of: (i) $1,000 ($83.33 per month), or (ii) one-half of the reduction in the borrower's annualized monthly payment for each month a timely payment is made. A borrower can earn the right to receive a "pay for performance" principal balance reduction payment for payments made during the first five years following execution of the Agreement provided the mortgage loan continues to be in good standing as of the date the payment is made. The "pay for performance" principal balance reduction payment will accrue monthly and be applied annually for each of the five years in which this incentive payment accrues, prior to the first payment due date after the anniversary of the month in which the trial period plan is effective. This payment will be paid to the servicer to be applied first towards reducing the interest-bearing UPB and then towards any principal forbearance amount (if applicable) on the mortgage loan. Any applicable prepayment penalties on partial principal prepayments made by Fannie Mae must be waived. Borrower incentive payments do not accrue during the Trial Period; however, in the first month of the modification, the borrower will accrue incentive payments equal to the number of months in the trial period in addition to any accrual earned during the first month of the modification.

If and when the mortgage loan ceases to be in good standing (that is, three monthly payments are due under the modified mortgage loan and unpaid on the last day of the third month), the borrower will cease

to be eligible for any further incentive payments after that time, even if the borrower subsequently cures his or her delinquency. The borrower will lose his or her right to any accrued incentive compensation when the mortgage loan ceases to be in good standing.

Borrower "pay for performance" principal balance reduction payments will accrue as long as the mortgage loan is current and the monthly payments are paid on time (the payment is made by the last day of the month in which the payment is due). For example, if the mortgage loan is current and the borrower makes 10 out of 12 payments on time, he or she will be credited for 10/12 of the annual incentive payment as long as the mortgage loan is in good standing at the time the annual "pay for performance" incentive is paid. A borrower whose mortgage loan is delinquent on a rolling 30- or 60-day basis will not accrue annual incentive payments.

Servicers must place the borrower incentives into an existing custodial account.

The IRS has ruled that the "pay for performance" principal balance reduction payments are excluded from gross income for tax reporting purposes.

Incentive Payment Process

Eligible incentives will be paid automatically based on information that is provided by the servicer through the HAMP servicer web portal and is, therefore, reliant on the servicers' timely and accurate reporting of mortgage loan information. The incentive payments will be made via ACH to the bank account(s) designated by the servicer on the *HAMP Registration Form* during the HAMP registration process. The incentive payments will be paid on the 27th calendar day of each month (or, if the 27th falls on a non-business day, the preceding business day).

On the business day prior to the date payment is made, servicers will be able to obtain a detailed report of the incentive payments to be remitted by viewing the *Cash Payment Report by Servicer* (OBE.10) available on the reporting web portal at HMPadmin.com. This report provides the total cash to be disbursed for each HAMP Registration Number, the aggregate for each HAMP Servicer Number associated with the HAMP Registration Number, and the loan level detail for each incentive type.

No incentives of any kind will be paid if the servicer has not executed the *Servicer Participation Agreement*, *HAMP Registration Form*, and/or reported loan information through the servicer web portal. This restriction includes incentives for any modification that becomes effective prior to the execution of the SPA even if the SPA is subsequently executed.

VII, Ch 6, Exhibit 1: NPV Versioning Requirements (02/04/10)

Detailed versioning requirements are included in the Base NPV Model Documentation, which is available at HMPadmin.com. These requirements include:

- Ensuring that the same major model version is used for repeat NPV tests as was used to qualify the borrower for a HAMP trial modification. For example:
    - If the borrower was qualified using any sub-version of a HAMP major model version on the portal, the borrower should be re-tested using at least the same HAMP major model version (and servicers are encouraged to re-test using the specific model release (for example 3.x) if possible). For borrowers initially tested on the portal, the portal automatically sorts borrowers into the appropriate model version based on the NPV Run Date.
    - If the borrower was tested on a proprietary model or a recoded version of the base model before September 1, 2009, the borrower should be re-tested using that proprietary model or recoded version. If that model is no longer operational and the servicer must use a different

model for subsequent tests, any re-test results used for the decision must be adjusted so that the borrower is insulated, as much as is possible, from NPV changes resulting purely from differences in the models. Servicers who have implemented a proprietary NPV model or are operating a recoded version of the base model should refer to the version control guidance issued on October 16, 2009 by Treasury's Compliance Agent for further details regarding treatment of these loans.

- Ensuring that all NPV inputs remain constant when the borrower is retested, except (i) those that were found to be incorrect at the time of the initial NPV evaluation and (ii) inputs that have been updated based on the borrower's income documentation. Inputs that may be updated based on the borrower's documentation are limited to the following:

  - Association dues/fees before modification
  - Monthly hazard and flood insurance
  - Monthly real estate taxes
  - Monthly gross income
  - UPB after modification (interest-bearing UPB)
  - Principal forbearance amount
  - Interest rate after modification
  - Amortization term after modification
  - P&I payment after modification

  Inputs that may not change regardless of their evolution since the trial's initiation include:

  - UPB before modification
  - Borrower FICO® and co-borrower FICO
  - Property value
  - Interest rate before modification
  - Term before modification
  - Monthly P&I payments before modification
  - Months past due
  - ARM reset rate and ARM reset date
  - Data collection date
  - Imminent default status
  - NPV run date
  - Advances/escrow

- Discount rate risk premium (spread of discount rate over PMMS rate)

- Servicers who have implemented a proprietary NPV model or are operating a recoded version of the base model must ensure that all economic inputs remain constant from the first to subsequent tests. Inputs that should be held constant include the PMMS rate and all quarterly input tables.

VII, Ch 6, Exhibit 2: Model Clauses for Borrower Notices (12/14/09)

The model clauses in this exhibit provide sample language that may be used to communicate the status of a borrower's request for a Home Affordable Modification. Use of the model clauses is optional; however, they illustrate a level of specificity that is deemed to be in compliance with the requirements of the program.

Non Approval Notice

1. **Ineligible Mortgage Loan.** We are unable to offer you a Home Affordable Modification because your mortgage loan did not meet one or more of the basic eligibility criteria of the Home Affordable Modification Program.

   [ ] You did not obtain your mortgage loan on or before January 1, 2009.

   [ ] Your loan with us is not a first lien mortgage.

   [ ] The current unpaid principal balance on your mortgage loan is higher than the program limit. ($729,750 for a one unit property, $934,200 for a two unit property, $1,129,250 for a three unit property and $1,403,400 for a four unit property).

2. **Ineligible Borrower.** We are unable to offer you a Home Affordable Modification because your current monthly housing expense, which includes the monthly principal and interest payment on your first lien mortgage loan plus property taxes, hazard insurance, and homeowner's dues (if any) is less than or equal to 31 percent of your gross monthly income (your income before taxes and other deductions) which, (*select one*) [you told us is $_____] OR [we verified as $_____]. Your housing expense must be greater than 31 percent of your gross monthly income to be eligible for a Home Affordable Modification. If you believe this verified income is incorrect, please contact us at the number provided below.
3. **Property Not Owner Occupied.** We are unable to offer you a Home Affordable Modification because you do not live in the property as your primary residence.
4. **Ineligible Property.** We are unable to offer a Home Affordable Modification because your property:

   [ ] Is vacant

   [ ] Has been condemned.

   [ ] Has more than four dwelling units.

5. **Investor Guarantor Not Participating.** We are unable to offer you a Home Affordable Modification because:

   [ ] We service your mortgage loan on behalf of an investor or group of investors that has not given us the contractual authority to modify your mortgage loan under the Home Affordable Modification Program.
   [ ] Your mortgage loan is insured by a private mortgage insurance company that has not approved a modification under the Home Affordable Modification Program.
   [ ] Your mortgage loan is guaranteed and the guarantor has not approved a modification under the Home Affordable Modification Program.

6. **Bankruptcy Court Declined**. We are unable to offer you a Home Affordable Modification because you have filed for bankruptcy protection, and the proposed modified mortgage loan terms were not approved by the Bankruptcy Court. You may wish to contact your bankruptcy counsel or trustee to discuss this decision.
7. **Negative NPV**. The Home Affordable Modification Program requires a calculation of the net present value (NPV) of a modification using a formula developed by the Department of the Treasury. The NPV calculation requires us to input certain financial information about your income and your mortgage loan including the factors listed below. When combined with other data in the Treasury model, these inputs estimate the cash flow the investor (owner) of your mortgage loan is likely to receive if the mortgage loan is modified and the investor's cash flow if the mortgage loan is not modified. Based on the NPV results, the owner of your mortgage loan has not approved a modification.

   If we receive a request from you within 30 calendar days from the date of this letter, we will provide you with the date the NPV calculation was completed and the input values noted below. If within 30 calendar days of receiving this information you provide us with evidence that any of these input values are inaccurate, and those inaccuracies are material, for example a significant difference in your gross monthly income or an inaccurate zip code, we will conduct a new NPV evaluation. While there is no guarantee that a new NPV evaluation will result in the owner of your mortgage loan approving a modification, we want to ensure that the NPV evaluation is based on accurate information.

   Available NPV Inputs

   a. Unpaid balance on the original mortgage loan as of [Data Collection Date]
   b. Interest rate before modification as of [Data Collection Date].
   c. Months delinquent as of [Data Collection Date]
   d. Next ARM reset date (if applicable)
   e. Next ARM reset rate (if applicable)
   f. Principal and interest payment before modification
   g. Monthly insurance payment
   h. Monthly real estate taxes
   i. Monthly HOA fees (if applicable)
   j. Monthly gross income
   k. Borrower's Total Monthly Obligations
   l. Borrower FICO
   m. Co-borrower FICO (if applicable)
   n. Zip Code
   o. State
8. **Default Not Imminent**. We are unable to offer you a Home Affordable Modification because you are current on your mortgage loan and, after reviewing the financial information you provided us, we

have determined that you are not at risk of default because:

[ ] You have not documented a financial hardship that has reduced your income or increased your expenses, thereby impacting your ability to pay your mortgage loan as agreed.

[ ] You have sufficient net income to pay your current mortgage payment.

[ ] You have the ability to pay your current mortgage payment using cash reserves or other assets.

9. **Excessive Forbearance.** We are unable to offer you a Home Affordable Modification because we are unable to create an affordable payment equal to 31 percent of your reported monthly gross income without changing the terms of your mortgage loan beyond the requirements of the program.
10. **Previous HAMP Modification.** We are unable to offer you a Home Affordable Modification because your mortgage loan was previously modified under the Home Affordable Modification Program. The program does not allow more than one modification.
11. **Request Incomplete.** We are unable to offer you a Home Affordable Modification because you did not provide us with the documents we requested. A notice which listed the specific documents we needed and the time frame required to provide them was sent to you more than 30 days ago.
12. **Trial Plan Default.** We are unable to offer you a Home Affordable Modification because you did not make all of the required trial period plan payments by the end of the trial period.

Loan Paid Off or Reinstated. We are not considering your request for a modification because:

[ ] Your mortgage loan was paid in full on _____.

[ ] Your mortgage loan was reinstated on _____ and you no longer appear to be in need of modification. If you feel that you are at risk of default, please contact us to discuss your eligibility and qualification for a Home Affordable Modification.

Offer Not Accepted by Borrower / Request Withdrawn. We are not considering your request for a modification because:

[ ] After being offered a trial period plan or Home Affordable Modification you notified us on _____ that you did not wish to accept the offer.

[ ] After initially asking to be considered for a Home Affordable Modification you withdrew that request on _____.

Incomplete Information Notice. We cannot continue to review your request for a Home Affordable Modification because:

[ ] You are currently in a trial period plan, however you have not provided all of the documentation we previously requested. If we do not receive the required documents by [insert expiration date of trial period plan, but no less than 30 days from the date of the letter] we will terminate your trial period plan and may resume other means to collect any amounts due on your account. The documents we need are: [Insert list of required documents]

[ ] You have requested consideration for a trial period plan, however, you have not provided all of the documentation we previously requested. If we do not receive the required documents by [insert date no less than 30 days from the date of the letter], we will consider that you have withdrawn your request for a modification and may resume other means to collect any amounts due on your account. The documents we need are: [Insert list of required documents.]

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MERS® Annual Report

The MERS® Annual Report of Quality Assurance Standards Compliance is a report that is required by the Executive Sponsor for each Member Servicer or Subservicer each calendar year and requires the following:

- Procedures in place for assurance that the MERSCORP data for all MERS® System required and conditional reporting fields.
- Conducted system-to-system reconciliations for all MERS® System required and conditional reporting fields at the required frequency.
- All the required and conditional fields entered on the MERS® System match those values in Member's internal system, and discrepancies and remediation activities necessary to align the two systems are tracked and monitored on aging reports until cleared.
- Practiced procedures designed to provide reasonable assurance that daily capture of all reject/warning reports associated with registrations, transfers, and status updates on open-item aging reports are addressed.
- Practiced procedures that are designed to provide reasonable assurance of compliance with the Rules and Procedures applicable to the MERS® Signing Officers.
- Active monitoring of performance against Member's Quality Assurance Plan and has reviewed the plan at least annually for effectiveness and has revised the plan as necessary.
- Documentation of any exceptions to the above conditions.

The Annual Report is due by December 31 and may be completed by an independent control function inside your organization like a corporate compliance risk manager or by an independent quality control company not affiliated with member's organization.

Lite Members are not required to submit an Annual Report of MERS® System Quality Assurance Standards Compliance. However, if a Lite Member is upgraded to General membership status because they are servicing one or more

loans for more than 90 days, they become responsible for all Member Servicer requirements as soon as they are upgraded.

Due to the revised format of this Annual Report, there is an updated QA manual and QC Plan.

Related service pages:

- Mortgage Servicing QC
- Multifamily Audits
- Repurchase Audits
- Appraisal Services
- Federal Regulatory Audits
- Mortgage Compliance Services
- Compliance with MERS®
- **MERS® Annual Report**
- QC MERS® Audits
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UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
COMPTROLLER OF THE CURRENCY
WASHINGTON, D.C.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

FEDERAL DEPOSIT INSURANCE CORPORATION
WASINGTON, D.C.

OFFICE OF THRIFT SUPERVISION
WASHINGTON, D.C.

FEDERAL HOUSING FINANCE AGENCY
WASHINGTON, D.C.

In the Matter of:	
MERSCORP, Inc., and the Mortgage Electronic Registration Systems, Inc., Reston, Virginia	OCC No. AA-EC-11-20 Board of Governors Docket Nos. 11-051-B-SC-1, 11-051-B-SC-2 FDIC-11-194b OTS No. 11-040 FHFA No. EAP-11-01

CONSENT ORDER

The Comptroller of the Currency of the United States of America ("Comptroller"), through his national bank examiners and other staff of the Office of the Comptroller of the Currency ("OCC"), the Board of Governors of the Federal Reserve System, Washington, D.C. ("Board of Governors"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), and the Federal Housing Finance Agency ("FHFA") (collectively

the "Agencies"), as part of an interagency horizontal review of major residential mortgage servicers and mortgage service providers, have conducted an examination of MERSCORP, Inc. ("MERSCORP"), and of its wholly-owned subsidiary corporation, Mortgage Electronic Registration Systems, Inc., ("MERS"), both of which provide various services to financial institutions related to tracking and registering residential mortgage ownership and servicing, acting as mortgagee of record in the capacity of nominee for lenders, and initiating foreclosure actions. The Agencies have identified certain deficiencies and unsafe or unsound practices by MERS and MERSCORP that present financial, operational, compliance, legal and reputational risks to MERSCORP and MERS, and to the participating Members. Members are institutions that use MERSCORP's and MERS' services and have agreed to abide by MERSCORP's Rules of Membership (the "Rules"). The Members include depository institutions regularly examined by, or subsidiaries or affiliates of depository institutions subject to examination by the OCC, the Board of Governors, the FDIC, the OTS, and other appropriate Federal banking agencies, as defined by subsection 1(b)(1) of the Bank Service Company Act, 12 U.S.C. § 1861(b)(1), and Fannie Mae and Freddie Mac, which are subject to examination by the FHFA, (collectively "Examined Members"). The Agencies have informed MERS and MERSCORP of the findings resulting from the examination. MERS and MERSCORP have begun implementing procedures to remediate the practices addressed in this Order.

MERS and MERSCORP, by and through their duly elected and acting Boards of Directors (collectively the "Boards"), have executed a "Stipulation and Consent to the Issuance of a Consent Order," dated April 13, 2011 ("Stipulation and Consent"), that is accepted by the Agencies. By this Stipulation and Consent, which is incorporated by reference, MERS and MERSCORP have consented to the issuance of this Consent Cease and Desist Order ("Order"),

pursuant to 12 U.S.C. §§ 1818(b), 1867(c)-(d), and 4631, by the Agencies, consistent with the Stipulation and Consent. MERS and MERSCORP have committed to take all necessary and appropriate steps to remedy the deficiencies and unsafe or unsound practices identified by the Agencies.

ARTICLE I

JURISDICTION

For purposes of this Consent Order:

(1) MERS and MERSCORP are providers of services to Examined Members within the meaning of 12 U.S.C. § 1867(c).

(2) MERS and MERSCORP are each an "institution-affiliated party" within the meaning of 12 U.S.C. § 1813(u) by virtue of MERS acting as agent for lenders (who include Examined Members) with respect to serving as mortgagee in a nominee capacity for the lender, and are each an "entity-affiliated party" within the meaning of 12 U.S.C. § 4502(11) by virtue of MERS acting as agent for Fannie Mae and Freddie Mac with respect to serving as mortgagee in a nominee capacity for the owner of residential mortgage loans.

(3) The OCC, the Board of Governors, the OTS, and the FDIC examined the services provided by MERS and MERSCORP to Examined Members pursuant to the provisions of 12 U.S.C. § 1867(c), on behalf of themselves and other appropriate Federal banking agencies as defined in 12 U.S.C. § 1861(b)(1).

(4) The Agencies have authority to enter into this Consent Order pursuant to 12 U.S.C. §§ 1818(b), 1867(c)-(d), and 4631.

ARTICLE II

AGENCIES' FINDINGS

The Agencies find, and MERS and MERSCORP neither admit nor deny, the following:

(1) MERS is a wholly-owned subsidiary of MERSCORP. MERSCORP's shareholders include federally regulated financial institutions that own and/or service residential mortgages, including Examined Members, and other primary and secondary mortgage industry participants.

(2) MERSCORP operates a national electronic registry that tracks beneficial ownership interests and servicing rights associated with residential mortgage loans and any changes in those interests or rights. There are approximately 5,000 participating Members, of which 3,000 are residential mortgage servicers. Members register loans and report transfers, foreclosures, and other changes to the status of residential mortgage loans on the MERS System. There are currently approximately 31 million active residential mortgage loans registered on the MERS System. Examined Members receive a substantial portion of the services provided by MERSCORP and MERS.

(3) MERS serves as mortgagee of record and nominee for the participating Members in local land records. MERS takes action as mortgagee through documents executed by "certifying officers" of MERS. MERS has designated these individuals, who are officers or employees of Members or certain third-parties who have contractual relationships with Members, as officers of MERS. By virtue of these designations, the certifying officers execute legal documents in the name of MERS, such as mortgage assignments and lien releases.

(4) In connection with services provided to Examined Members related to tracking, and registering residential mortgage loans and initiating foreclosures ("residential mortgage and foreclosure-related services"), MERS and MERSCORP:

(a) have failed to exercise appropriate oversight, management supervision and corporate governance, and have failed to devote adequate financial, staffing, training, and legal resources to ensure proper administration and delivery of services to Examined Members; and

(b) have failed to establish and maintain adequate internal controls, policies, and procedures, compliance risk management, and internal audit and reporting requirements with respect to the administration and delivery of services to Examined Members.

(5) By reason of the conduct set forth above, MERS and MERSCORP engaged in unsafe or unsound practices that expose them and Examined Members to unacceptable operational, compliance, legal, and reputational risks.

Pursuant to the authority vested in them by the Federal Deposit Insurance Act, as amended, 12 U.S.C. §§ 1818(b), the Bank Service Company Act, 12 U.S.C. § 1867(c)-(d), and the Federal Housing Enterprises Financial Safety and Soundness Act, 12 U.S.C. § 4631, the Agencies hereby ORDER that:

ARTICLE III

COMPLIANCE COMMITTEE

(1) Within twenty (20) days of this Order, the Boards of Directors of MERSCORP and MERS (the "Boards") shall each establish and thereafter maintain a Compliance Committee of at least three (3) directors, of which at least two (2) may not be employees or officers of MERS or MERSCORP or any of their subsidiaries or affiliates. In the event of a change of the

membership, the name of any new committee member shall be submitted to the OCC Deputy Comptroller for Large Bank Supervision ("Deputy Comptroller"). The Compliance Committee shall be responsible for monitoring and coordinating MERS' and MERSCORP's compliance with the terms and provisions of this Order. The Compliance Committee shall meet at least monthly and maintain minutes of its meetings.

(2) Within ninety (90) days of this Order, and within thirty (30) days of the end of each calendar quarter thereafter, the Compliance Committee shall submit a written progress report to the Boards setting forth in detail its actions taken to comply with each Article of this Consent Order, and the results and status of those actions.

(3) The Boards shall forward a copy of the Compliance Committee's report, with any additional comments by the Boards, to the Deputy Comptroller and the OCC Examiner-in-Charge within ten (10) days of receiving such report.

ARTICLE IV

ACTION PLAN

(1) Within ninety (90) days of this Order, MERS and MERSCORP shall jointly develop and submit to the Deputy Comptroller an acceptable plan containing a complete description of the actions that are necessary and appropriate to achieve compliance with the terms and provisions of this Order ("Action Plan"), as well as the resources to be devoted to the planned actions, with respect to services provided to Examined Members. In the event the Deputy Comptroller requests MERS or MERSCORP to revise the Action Plan, they shall immediately make the requested revisions and resubmit the Action Plan to the Deputy Comptroller. Following acceptance of the Action Plan by the Deputy Comptroller, MERS and

MERSCORP shall not take any action that would constitute a significant deviation from, or material change to the requirements of the Action Plan, or this Order, unless and until MERS or MERSCORP have received a prior written determination of no supervisory objection from the Deputy Comptroller.

(2) The Boards shall ensure that MERS and MERSCORP achieve and thereafter maintain compliance with this Order, including, without limitation, successful implementation of the Action Plan. The Boards shall further ensure that, upon implementation of the Action Plan, MERS and MERSCORP achieve and maintain effective residential mortgage and foreclosure-related services on behalf of Examined Members, as well as associated risk management, compliance, quality control, audit, training, staffing, and related functions. In order to comply with these requirements, the Boards shall:

(a) require the timely reporting by MERS and MERSCORP management of such actions taken to comply with this Order and/or directed by either Board to be taken pursuant to this Order;

(b) follow-up on any compliance issues with such actions in a timely and appropriate manner; and

(c) require corrective action be taken in a timely manner for any non-compliance with such actions.

(3) The Action Plan shall address, at a minimum:

(a) the capability of the Boards and senior management to ensure that MERS and MERSCORP are operated in a safe and sound manner in accordance with applicable laws, regulations and requirements of this Order;

(b) development and implementation of a strategic plan to include a comprehensive review of business operations, including the risks associated with each business line, and recommendations to implement the strategic plan;

(c) consistent with the strategic plan, development and implementation of a financial plan to ensure that MERSCORP and MERS have adequate financial strength to support business operations related to Examined Members. The financial plan, at a minimum, shall address:

(i) any need for additional capital, including the amount and source of capital;

(ii) the identification, measurement, monitoring and control of funding and liquidity risk; and

(iii) a profit and budget plan to include specific goals to reduce discretionary expenses and improve and sustain earnings, as well as maintain adequate reserves for contingency risks and liabilities;

(d) development and implementation of a comprehensive litigation strategy to effectively manage lawsuits and legal challenges involving MERS and MERSCORP, regardless of whether MERSCORP or MERS is a named party, including early identification and tracking of such lawsuits and challenges;

(e) development and implementation of a communication plan to communicate effectively and in a timely manner with MERSCORP's shareholders, Members including Examined Members, and relevant external parties;

(f) development and implementation of a compliance and quality assurance program for ensuring that Examined Members implement and follow all of the Rules, including

adherence to the requirements set forth in MERS Announcement 2011-01, dated February 16, 2011;

(g) development and implementation of a plan to ensure that MERS certifying officers are transitioned expeditiously onto the Corporate Resolution Management System ("CRMS") in accordance with MERS' current certifying officer policy and process;

(h) development and implementation of appropriate standards to maintain separation of corporate functions between MERS and MERSCORP;

(i) review of the effectiveness of the Rules, and related Procedures, Terms and Conditions to determine what, if any, additions, amendments, or deletions are appropriate;

(j) development and implementation of enhanced information reporting practices to senior management from lower levels of each organization, and from senior management to the Boards to ensure that significant issues are properly identified and escalated, and that corporate actions are considered, taken in a timely fashion, ands properly documented;

(k) any Matter Requiring Attention in the OCC Supervisory Letter No. MERS 2011-01, dated January 19, 2011, that addresses an issue that is not otherwise covered by provisions of this Order; and

(l) development of contingency plans to address issues that arise with respect to any of the foregoing elements of the Action Plan, including plans that address operational continuity issues in the normal course of business and in a stressed environment.

(4) The Action Plan shall specify timelines for completion of each of the requirements of this Order. The timelines in the Action Plan shall be consistent with any deadlines set forth in this Order.

ARTICLE V

BOARD AND MANAGEMENT SUPERVISION

(1) Within thirty (30) days from the effective date of this Order, MERSCORP and MERS shall engage an independent third party, acceptable to the Deputy Comptroller, with the appropriate expertise and qualifications to analyze and assess the directors, officers, management and staffing needs with respect to any and all services provided by MERSCORP and MERS to Examined Members, in order to operate MERS and MERSCORP in a safe and sound manner and achieve compliance with this Order. The engagement shall provide that the required analysis and assessment be completed and summarized in a written report to the Boards ("Management Report") within sixty (60) days of the third party's engagement, with a copy simultaneously delivered to the Deputy Comptroller. At a minimum, the Management Report shall:

(a) identify the type and number of positions needed appropriately to manage and supervise all services provided to Examined Members, including, but not limited to: (i) the orderly and expeditious transitioning of Examined Members onto the CRMS; (ii) the enhanced communication and coordination with Examined Members required by the Communications Plan; and (iii) registration or tracking systems, assignment and/or foreclosure services, detailing any vacancies and additional staffing needs with appropriate consideration to the scope and complexity of the services provided, for the number of Examined Members and MERS certifying officers who will need to complete the certification process, and for the size of the portfolios for which these services are provided;

(b) identify the type and number of officer and staff positions needed to ensure compliance with all applicable federal and state laws and regulations and material

contractual requirements, as well as to implement any newly established or revised plans, policies, procedures, processes and systems required by this Order, detailing any vacancies, additional needs and/or unit re-alignments required with appropriate consideration to the scope and complexity of the services provided as well as the size of the portfolios for which these services are provided;

(c) identify and address the appropriateness of the duties, responsibilities, authority and accountability of each professional position, giving due consideration to the relevant knowledge, skills, abilities, and experience of the incumbent (if any);

(d) present a clear and concise description of the relevant knowledge, skills, abilities, and experience necessary for each officer position, including delegations of authority and performance objectives, including whether the incumbent (if any) has the requisite knowledge, skills, abilities, and experience for such position;

(e) recommend a plan to recruit and retain directors, officers, management and staff consistent with the independent third party's analysis and assessment;

(f) recommend any reorganization or realignment of directors, officers, management and staff consistent with the independent third party's analysis and assessment;

(g) recommend any additional training and development needs as well as a plan to provide such training and development to appropriate directors, officers, management and staff; and

(h) recommend procedures to periodically review and update the Management Plan required by subparagraph (3) below and assess the performance of all directors, officers, management and staff.

(2) MERSCORP and MERS shall provide a copy of the proposed engagement letter or contract with the third party to the Deputy Comptroller for review and non-objection prior to entering into the engagement.

(3) Within thirty (30) days of receipt of the Management Report, MERSCORP and MERS shall jointly develop a written plan of action (the "Management Plan") in response to each recommendation contained in the Management Report and a time frame for completing each action. The Management Plan and any subsequent modification(s) thereto shall be submitted to the Deputy Comptroller for review and non-objection.

(4) The Boards shall immediately establish a schedule of regular Board meetings to be held at least once every calendar quarter.

ARTICLE VI

COMMUNICATIONS RELATING TO LEGAL PROCEEDINGS

(1) Within sixty (60) days of this Order, MERS and MERSCORP shall jointly develop and submit to the Deputy Comptroller a plan for communicating with Members concerning significant legal proceedings or issues. The plan shall include:

(a) a process for notifying and informing Examined Members concerning significant legal proceedings and legal issues that relate to the functioning of MERS, MERSCORP, or the Examined Members' interests with respect to MERS or MERSCORP, including, but not limited to significant favorable or adverse decisions, within a short time period after the issue arises or a decision is issued;

(b) a process that provides sufficient incentives for Members to inform MERSCORP and MERS of the filing of all lawsuits brought in MERS' name or to which MERS is a named party, and periodically update MERS concerning the status of such lawsuit;

(c) a process to track all legal proceedings brought in MERS' name, in which MERS is a named party, or which involve legal issues that affect the interests of MERS, MERSCORP, or Examined Members with respect to MERSCORP and MERS;

(d) a process to ensure an appropriate response by MERS to legal proceedings brought in MERS' name, in which MERS is a named party, or which involve legal issues that affect the interests of MERS, MERSCORP, or Examined Members with respect to MERSCORP and MERS;

(e) proposed revisions as necessary to the MERSCORP Rules to implement these processes.

(2) Within thirty (30) days of this Order, MERSCORP and MERS shall establish Legal Risk Subcommittees of the Boards, which shall make regular reports to the Boards on outstanding legal issues and pending litigation that affect the interests of MERS, MERSCORP, and Examined Members with respect to MERSCORP and MERS, and provides analysis and recommendations concerning litigation contingency reserves.

ARTICLE VII

CERTIFYING OFFICERS

(1) Within sixty (60) days of this Order, MERS shall prepare and submit a plan to the Deputy Comptroller to strengthen its governance processes applicable to MERS certifying officers with respect to Examined Members. The plan shall include, but not be limited to:

(a) policies and processes to designate or certify individuals as authorized MERS certifying officers, and that only such individuals act in such capacity;

(b) policies, processes and resources to track the identity and activities of MERS certifying officers and to ensure their compliance with the Rules and related requirements, including the requirements of the CRMS;

(c) policies, processes and resources to register third-party MERS certifying officers who are acting for Examined Members;

(d) policies, processes and resources to ensure the adequacy and appropriateness of training for certifying officers;

(e) policies, processes, and resources to ensure that Examined Members comply with MERS Membership Rule 8 and MERS Announcement 2011-01; and

(f) policies, processes, and resources to ensure that Examined Members and third parties can quickly and accurately determine if specific individuals are designated to act as authorized MERS certifying officers.

ARTICLE VIII

QUALITY ASSURANCE AND DATA INTEGRITY

(1) Within sixty (60) days of this Order, MERS and MERSCORP shall jointly prepare and submit a plan to the Deputy Comptroller to strengthen its policies, processes, resources and controls for data standards and quality assurance of information submitted to and contained in MERSCORP data systems. The plan shall include, but not be limited to:

(a) an assessment and determination of which data elements are necessary to MERS and MERSCORP operations and should be mandatory reporting requirements

("mandatory reporting fields") for Examined Members. The plan shall include elimination of collection of existing data elements currently reported by Members that are not reasonably related to MERS or MERSCORP operations;

(b) policies, processes and resources to ensure the accuracy and reliability of data reported to MERSCORP, including but not limited to system-to-system reconciliations of all MERS mandatory reporting fields, frequent capture of all reject/warning reports associated with registrations, transfers, and status updates on open-item aging reports, and an accurate determination of foreclosures pending in MERS' name;

(c) adoption or revision of an adequate written quality assurance procedures manual and processes to ensure appropriate implementation of the quality assurance program described in the quality assurance procedures manual;

(d) policies, processes and resources to ensure that Examined Members comply with MERSCORP approved quality assurance plans submitted to MERSCORP by Examined Members and provide to MERSCORP an annual independent report demonstrating their adherence to their MERSCORP approved quality assurance program, including submission of all mandatory MERS data reporting fields, and processes for system-to-system reconciliation and reject/warning error correction.

ARTICLE IX

eREGISTRY

(1) Within ninety (90) days from the effective date of this Order, the MERSCORP Board shall obtain an independent, external review of and recommendations regarding the eRegistry system of recording electronic notes. The review and recommendations shall consider

whether appropriate policies, procedures, and operating controls are in place to ensure effective operation of eRegistry. Within sixty (60) days of completion of the review and recommendations required by this Article, MERSCORP shall submit to the Deputy Comptroller for review and supervisory non-objection a plan describing actions necessary to implement any changes to applicable policies, procedures and controls as a result of the findings of the audit. In the event the Deputy Comptroller asks MERSCORP to revise the plan required by this Article, MERSCORP shall immediately make the requested revisions and resubmit the plan.

ARTICLE X

COMMUNICATIONS PLAN

(1) Within sixty (60) days from the effective date of this Order, MERSCORP shall develop, adopt and implement a plan designed to enhance communications and coordination with its Examined Members with respect to their duties and responsibilities as set forth in the Rules and related Procedures, Terms and Conditions ("Communications Plan"). The Communication Plan shall, at a minimum, be designed to ensure that all Examined Members and appropriate personnel within an Examined Member are aware of, and can comply with current Rules and related Procedures, Terms and Conditions and any new or revised Rules or related Procedures, Terms and Conditions on an ongoing basis and to ensure that Examined Members and appropriate personnel within or retained by an Examined Member are aware of, and are able to comply with, the requirement to advise MERSCORP of the initiation of litigation naming or otherwise involving MERS, MERSCORP and/or one of their subsidiaries and coordinate the defense or prosecution of such litigation with MERSCORP.

ARTICLE XI

APPROVAL, IMPLEMENTATION AND REPORTS

(1) MERS and MERSCORP shall submit the written assessments, reports and plans required by this Order for review and written determination of no supervisory objection to the Deputy Comptroller and within the applicable time periods set forth in the Order. MERS and MERSCORP shall adopt the plans required by this Order upon receipt of a determination of no supervisory objection from the OCC, and shall immediately make any revisions requested by the Deputy Comptroller. Upon adoption, MERS and MERSCORP shall immediately implement the plans required by this Order and thereafter fully comply with them.

(2) During the term of this Order, the required plans, programs, policies and procedures shall not be amended or rescinded in any material respect without the prior written approval of the Deputy Comptroller.

(3) During the term of this Order, MERS and MERSCORP shall revise the required plans, programs, policies and procedures as necessary to incorporate new or changes to applicable federal and state laws, rules, regulations, guidelines, court orders, and contractual or other requirements.

(4) The Boards shall ensure that MERS and MERCORP have processes, personnel, resources, and control systems to ensure implementation of and adherence to the plans, programs, policies and procedures required by this Order.

(5) Within thirty (30) days after the end of each calendar quarter following the date of this Order, MERS and MERSCORP shall submit to the Deputy Comptroller a written progress report detailing the form and manner of all actions taken to secure compliance with the provisions of this Order and the results thereof. The progress report shall include information

sufficient to validate compliance with this Order, based on a testing program acceptable to the OCC that includes, if required by the OCC, validation by third-party independent consultants acceptable to the Deputy Comptroller. The Deputy Comptroller may, in writing, discontinue the requirement for progress reports or modify the reporting schedule.

(6) All communication regarding this Order shall be sent to:

(a) Joseph H. Evers
Deputy Comptroller for Large Bank Supervision
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219

With copy to:

(b) Stephen Jackson
National Bank Examiner
Office of the Comptroller of the Currency
250 E Street, SW
Washington, DC 20219

ARTICLE XII

COMPLIANCE AND EXTENSIONS OF TIME

(1) If MERS or MERSCORP contend that compliance with any provision of this Order would not be feasible or legally permissible, or requires an extension of any timeframe within this Order, the Boards shall submit a written request to the Deputy Comptroller asking for relief. Any written requests submitted pursuant to this Article shall include a statement setting forth in detail the special circumstances that prevent either MERS or MERSCORP from complying with a provision, that require the Deputy Comptroller to exempt either of them from a provision, or that require an extension of a timeframe within this Order.

(2) All such requests shall be accompanied by relevant supporting documentation, and to the extent requested by the Deputy Comptroller, a sworn affidavit or affidavits setting forth any other facts upon which MERS or MERSCORP relies. The Deputy Comptroller's decision concerning a request is final and not subject to further review.

ARTICLE XIII

OTHER PROVISIONS

(1) Although this Order requires MERS and MERSCORP to submit certain actions, reports and plans for the review or a written determination of no supervisory objection by the Deputy Comptroller, the Boards have the ultimate responsibility for proper and sound management of MERS and MERSCORP.

(2) In each instance in this Order in which MERS or MERSCORP are required to ensure adherence to, and undertake to perform certain obligations, it is intended to mean that the Boards shall:

(a) authorize and adopt such actions on behalf of MERS and MERSCORP as may be necessary for them to perform their obligations and undertakings under the terms of this Order;

(b) require the timely reporting of MERS and MERSCORP management of such actions directed by either Board to be taken under the terms of this Order;

(c) follow-up on any material non-compliance with such actions in a timely and appropriate manner; and

(d) require corrective action be taken in a timely manner of any material non-compliance with such actions.

(3) If, at any time, the Comptroller, the Board of Governors, the FDIC, the OTS, or the FHFA deems it appropriate in fulfilling the responsibilities placed upon them by the several laws of the United States to undertake any action affecting MERS or MERSCORP, nothing in this Order shall in any way inhibit, estop, bar or otherwise prevent either any of them from so doing.

(4) This Order is and shall become effective upon its execution by the Agencies through their authorized representatives whose hands appear below. The Order shall remain effective and enforceable, except to the extent that, and until such time as, any provision of this Order shall be amended, suspended, waived, or terminated in writing by the Comptroller.

(5) Any time limitations imposed by this Order shall begin to run from the effective date of this Order, as shown below, unless the Order specifies otherwise

(6) This Order is intended to be, and shall be construed to be, a final order issued pursuant to 12 U.S.C. §§ 1818(b), 1867(d), and 4631 and expressly does not form, and may not be construed to form, a contract binding the Comptroller, the Board of Governors, the FDIC, the OTS, or the FHFA or the United States. Without limiting the foregoing, nothing in this Order shall affect any action against MERS, MERSCORP or officers, directors, or employees by a financial regulatory agency, the United States Department of Justice or any other law enforcement agency, to the extent permitted under applicable law.

(7) The terms of this Order, including this paragraph, are not subject to amendment or modification by any extraneous expression, prior agreements, or prior arrangements between the parties, whether oral or written.

(8) Nothing in the Stipulation and Consent or this Order, express or implied, shall give to any person or entity, other than the parties hereto, and their successors hereunder, any

benefit or any legal or equitable right, remedy or claim under the Stipulation and Consent or this Order.

(9) The provisions of this Order shall be binding upon MERSCORP and MERS and their successors and assigns.

(10) MERS and MERSCORP consent to the issuance of this order before the filing of any notices, or taking of any testimony or adjudication, and solely for the purpose of settling this matter without a formal proceeding being filed.

IT IS SO ORDERED, this 13th day of April, 2011.

OFFICE OF THE COMPTROLLER OF THE CURRENCY

By: /s/Joseph H. Evers
Joseph H. Evers
Deputy Comptroller for Large Bank Supervision

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

By: /s/Jennifer. J. Johnson
Jennifer J. Johnson
Secretary of the Board

FEDERAL DEPOSIT INSURANCE CORPORATION

By: /s/Thomas J. Dujenski
Thomas J. Dujenski
Regional Director
Atlanta Regional Office

OFFICE OF THRIFT SUPERVISION

By: /s/Thomas A. Barnes
Thomas A. Barnes
Deputy Director
Examinations, Supervision and Consumer Protection

FEDERAL HOUSING FINANCE AGENCY

By: /s/Christopher H. Dickerson
Christopher H. Dickerson
Acting Deputy Director for Enterprise Regulation

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
COMPTROLLER OF THE CURRENCY
WASHINGTON, D.C.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

FEDERAL DEPOSIT INSURANCE CORPORATION
WASINGTON, D.C.

OFFICE OF THRIFT SUPERVISION
WASHINGTON, D.C.

FEDERAL HOUSING FINANCE AGENCY
WASHINGTON, D.C.

In the Matter of:	
MERSCORP, Inc., and the Mortgage Electronic Registration Systems, Inc., Reston, Virginia	OCC No. AA-EC-11-20 Board of Governors Docket Nos. 11-051-B-SC-1, 11-051-B-SC-2 FDIC-11-194b OTS No. 11-040 FHFA No. EAP-11-01

STIPULATION AND CONSENT TO THE ISSUANCE OF A CONSENT ORDER

The Comptroller of the Currency of the United States of America ("Comptroller" or "OCC"), and the Board of Governors of the Federal Reserve System ("Board of Governors"), the Federal Deposit Insurance Corporation ("FDIC"), the Office of Thrift Supervision ("OTS"), and the Federal Housing Finance Agency ("FHFA") (collectively

the "Agencies") intend to impose a cease and desist order on the Mortgage Electronic Registration Systems, Inc. ("MERS"), and its parent company, MERSCORP, Inc. ("MERSCORP"), pursuant to 12 U.S.C. § 1818(b),12 U.S.C. § 1867(c)-(d), and 12 U.S.C. § 4631, for certain deficiencies and unsafe or unsound practices by MERS and MERSCORP that present financial, operational, compliance, legal and reputational risks t MERSCORP and MERS, and to MERSCORP's members.

MERS and MERSCORP, in the interest of compliance and cooperation, enter into this Stipulation and Consent to the Issuance of a Consent Order ("Stipulation") and consent to the issuance of a Consent Order, dated April 13, 2011 ("Consent Order");

In consideration of the above premises, the Agencies, through their authorized representatives, and MERS and MERSCORP, through their duly elected and acting Boards of Directors, stipulate and agree to the following:

ARTICLE I
JURISDICTION

For purposes of this Stipulation and the Consent Order:

(1) MERS and MERSCORP are providers of services to depository institutions regularly examined by, or subsidiaries or affiliates of depository institutions subject to examination by the OCC, the Board of Governors, the FDIC, the OTS, and other appropriate Federal banking agencies, within the meaning of the Bank Service Company Act of 1962, 12 U.S.C. § 1867(c).

(2) MERS and MERSCORP are each an "institution-affiliated party" within the meaning of 12 U.S.C. § 1813(u), and are each an "entity-affiliated party" within the meaning of 12 U.S.C. § 4502(11).

(3) The OCC, the Board of Governors, FDIC and OTS examined the services provided by MERS and MERSCORP to national banks and other financial institutions pursuant to the provisions of 12 U.S.C. § 1867(c).

(4) The Agencies have authority to enter into this Consent Order pursuant to 12 U.S.C. §§ 1818(b), 1867(c)-(d) and 4631.

ARTICLE II
AGREEMENT

(1) MERS and MERSCORP, without admitting or denying any wrongdoing, consent and agree to issuance of the Consent Order by the Agencies.

(2) MERS and MERSCORP consent and agree that the Consent Order shall (a) be deemed an "order issued with the consent of the . . . institution-affiliated part[ies]" pursuant to 12 U.S.C. § 1818(h)(2) and an order to which an entity-affiliated party consents pursuant to 12 U.S.C. § 4633(a)(4); and (b) become effective upon its execution by the Agencies through their authorized representatives, and (c) be fully enforceable by the Agencies pursuant to 12 U.S.C. §§ 1818(i) and 1867(d), and 12 U.S.C. § 4631(f) and 4635.

(3) Notwithstanding the absence of mutuality of obligation, or of consideration, or of a contract, the Agencies may enforce any of the commitments or obligations herein undertaken by MERS or MERSCORP under their supervisory powers, including 12 U.S.C. §§ 1818(i) and 1867(c)-(d), and 12 U.S.C. §§ 4631 and 4635, and not as a matter of contract law. MERS and MERSCORP expressly acknowledge that MERS, MERSCORP, and the Agencies have no intention to enter into a contract.

(4) MERS and MERSCORP declare that no separate promise or inducement of any kind has been made by the Agencies, or by their agents or employees, to cause or induce MERS or MERSCORP to consent to the issuance of the Consent Order and/or execute the Consent Order.

(5) MERS and MERSCORP expressly acknowledge that no officer or employee of the Agencies has statutory or other authority to bind the United States, the United States Treasury Department, the Agencies, or any other federal bank regulatory agency or entity, or any officer or employee of any of those entities to a contract affecting the Agencies' exercise of their supervisory responsibilities.

(6) The terms and provisions of the Stipulation and the Consent Order shall be binding upon, and inure to the benefit of, the parties hereto and their successors in interest. Nothing in this Stipulation or the Consent Order, express or implied, shall give to any person or entity, other than the parties hereto, and their successors hereunder, any benefit or any legal or equitable right, remedy or claim under this Stipulation or the Consent Order.

ARTICLE III
WAIVERS

(1) MERS and MERSCORP, by consenting to this Stipulation, waive:

(a) the issuance of a Notice of Charges pursuant to 12 U.S.C. §§ 1818(b) and 4631(c);

(b) any and all procedural rights available in connection with the issuance of the Consent Order;

(c) all rights to a hearing and a final agency decision pursuant to 12 U.S.C. §§ 1818(b) and (h), 12 U.S.C. § 1867, 12 C.F.R. Part 19, and 12 U.S.C. § 4631(c);

(d) all rights to seek any type of administrative or judicial review of the Consent Order;

(e) any and all claims for fees, costs or expenses against the Agencies, or any of their agents or employees, related in any way to this enforcement matter or this Consent Order, whether arising under common law or under the terms of any statute, including, but not limited to, the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412; and

(f) any and all rights to challenge or contest the validity of the Consent Order.

ARTICLE IV
OTHER PROVISIONS

(1) The provisions of this Stipulation shall not inhibit, estop, bar, or otherwise prevent the Agencies from taking any other action affecting MERS or MERSCORP if, at any time, it deems it appropriate to do so to fulfill the responsibilities placed upon it by the several laws of the United States of America.

(2) Nothing in this Stipulation shall preclude any proceedings brought by the Agencies to enforce the terms of this Consent Order, and nothing in this Stipulation constitutes, and neither MERS nor MERSCORP shall contend that it constitutes, a waiver of any right, power, or authority of any other representative of the United States or an agency thereof, including, without limitation, the United States Department of Justice, to bring other actions deemed appropriate.

(3) The terms of the Stipulation and the Consent Order are not subject to amendment or modification by any extraneous expression, prior agreements or prior arrangements between the parties, whether oral or written.

IN TESTIMONY WHEREOF, the undersigned, authorized by the signatory Agencies as their representatives, have hereunto set their hands on behalf of the Agencies.

OFFICE OF THE COMPTROLLER OF THE CURRENCY

/s/Joseph H. Evers — April 13, 2011

By: Joseph H. Evers
Deputy Comptroller for
Large Bank Supervision

Date

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

/s/Jennifer J. Johnson — April 13, 2011

By: Jennifer J. Johnson
Secretary of the Board

Date

FEDERAL DEPOSIT INSURANCE CORPORATION

/s/Thomas J. Dujenski — April 13, 2011

By: Thomas J. Dujenski
Regional Director
Atlanta Regional Office

Date

OFFICE OF THRIFT SUPERVISION

/s/Thomas A. Barnes — April 13, 2011
By: Thomas A. Barnes — Date
Deputy Director
Examinations,
Supervisions and
Consumer Protection

FEDERAL HOUSING FINANCE AGENCY

/s/Christopher H. Dickerson — April 13, 2011
By: Christopher H. Dickerson — Date
Acting Deputy Director for Enterprise Regulation

IN TESTIMONY WHEREOF, the undersigned, as the duly elected and acting Boards of Directors of MERS and MERSCORP, have hereunto set their hands on behalf of MERS and MERSCORP.

For MERSCORP:

/s/Diane Citron — April 12, 2011
Diane Citron — Date
MERSCORP

/s/John Courson — April 12, 2011
John Courson — Date
MERSCORP

/s/Joe Jackson — April 12, 2011
Joe Jackson — Date
MERSCORP

/s/Brian McCrackin
Brian McCrackin
MERSCORP

April 12, 2011
Date

/s/Kurt Pfotenhauer
Kurt Pfotenhauer
MERSCORP

April 12, 2011
Date

/s/Robert Reynolds
Robert Reynolds
MERSCORP

April 12, 2011
Date

/s/Joseph Rossi
Joseph Rossi
MERSCORP

April 12, 2011
Date

/s/Steven Stein
Steven Stein
MERSCORP

April 12, 2011
Date

/s/Marianne Sullivan
Marianne Sullivan
MERSCORP

April 12, 2011
Date

/s/Larry Washington
Larry Washington
MERSCORP

April 12, 2011
Date

For MERS:

/s/John Courson
John Courson
MERS

April 12, 2011
Date

/s/Edward Kramer
Edward Kramer
MERS

April 12, 2011
Date

/s/Kurt Pfotenhauer
Kurt Pfotenhauer
MERS

April 12, 2011
Date

/s/Marianne Sullivan
Marianne Sullivan
MERS

April 12, 2011
Date

/s/Joseph Rossi
Joseph Rossi
MERS

April 12, 2011
Date

Exhibit 38

BOISE PHYSICAL MEDICINE & REHABILITATION CLINIC

1000 North Curtis Road, Suite 202
Boise, Idaho 83706

(208) 377-3435
FAX (208) 377-3147

Michael R. McMartin, M.D. Rodde D. Cox, M.D. Vic Kadyan, M.D. Arden Mahaffey, D.O.

November 30, 2011

Re: Greg Renshaw

To Whom It May Concern:

I am writing this letter of medical necessity on behalf of my long term patient Greg Renshaw in support of maintaining in-home skilled provider care and in-home community-based living for Mr Renshaw. Mr. Renshaw is a remarkable 48-year-old gentleman who suffered a traumatic cervical spinal cord injury in 1990 with resultant C4 complete quadriplegia. He underwent a comprehensive inpatient and outpatient rehabilitation plan of care under my direction from 1990 to 1992. Since that time, I have continued to follow Mr. Renshaw for his spinal cord condition. Mr. Renshaw has remained remarkably healthy while living in our community in his own home over these past many years. He is dependent on in-home personal care provider skilled care to maintain medical stability specific to skin care, neurogenic bladder management, neurogenic bowel management, all self care activities, and mobility support. He is dependent in all areas of self care and mobility and personal hygiene. In my 22 years as a rehabilitation practicing physician here in the Boise area, Mr. Renshaw is one of three patients at the level of high quadriplegia who has been able to maintain independent living in a home setting. This is a tribute to his remarkable dedication to maintaining a semi-independent living situation outside of a chronic care facility. At this level of disability and spinal cord injury, over 90% of patients with this injury would be cared for in a long term care facility/nursing home environment. Mr. Renshaw is a living example of how in-home skilled care can be tremendously cost effective to society both financially as well as psychologically. Mr. Renshaw has informed me that he is undergoing a current review for potential foreclosure from his home. In my medical opinion, this would be a devastating transition for Mr. Renshaw. I have no doubt that he would become clinically depressed, withdrawn, and potentially suicidal if he were forced to leave his home and be admitted to a long term care facility. From my medical perspective, I strongly encourage all parties involved in this evaluation and potential plan of care to make every effort possible to allow Mr. Renshaw to remain in his home situation and continue to receive personal care services within his home. He has maintained remarkably excellent health over the past 21 years in this home setting which is remarkably distinct from the experience of most patients with this type of spinal cord injury cared for in a long term care facility. Long term care facility patients are at a much higher risk for recurrent infection, depression, skin breakdown, and other comorbid problems.

I have tremendous respect and appreciation for Mr. Renshaw and all his dedicated efforts to maintain a community home-based living situation. Once again, I propose every effort possible

be made to prevent Mr. Renshaw from the psychological, emotional, and behavioral hardship of transitioning out of his home situation.

Sincerely,

Michael R. McMartin, M.D.

MRM/eh

BOISE PHYSICAL MEDICINE & REHABILITATION CLINIC

1000 North Curtis Road, Suite 202
Boise, Idaho 83706

(208) 377-3435
FAX (208) 377-3147

Michael R. McMartin, M.D. Rodde D. Cox, M.D. Vic Kadyan, M.D. Arden Mahaffey, D.O.

January 31, 2012

Jon Steele, Attorney at Law
1020 West Main Street, Suite 400
Boise, ID 83702
Fax: (208) 343-3246

Regarding: Greg Renshaw

Dear Mr. Steele:

I am writing this letter in response to your letter dated 12/12/11 regarding Greg Renshaw. I will profile this response letter based on the itemized questions you present in your letter.

1. **Is there an average life expectancy of a quadriplegic? If so, what is it?** The life expectancy of a quadriplegic is strongly dependent on the age of an individual at the time of their spinal cord injury and other co-morbidities. To my knowledge, there is no average life expectancy of a quadriplegic in general. It is safe to assume that any individual suffering a traumatic spinal cord injury with resultant quadriplegia has a shortened life expectancy compared to a normal individual.
2. **Do you have an opinion to a reasonable degree of medical certainty as to Mr. Renshaw's life expectancy if he remains in his home? If so, what is it?** As noted above, it is very difficult to project the life expectancy for Mr. Renshaw. He suffered his traumatic spinal cord injury 21 years ago. He continues to be at risk for pneumonia, decubitus ulcer skin breakdown, urinary tract infections, and cardiomyopathy due to quadriplegia as he gets older. I think his life expectancy is definitely shorter than it would be without having had his spinal cord injury. Any other estimate, however, would simply be a projection on my part.
3. **How is it that Mr. Renshaw can live independently in his home?** Mr. Renshaw requires skilled care provider services for management of his neurogenic bladder, neurogenic bowel, skin pressure sore prevention, and all self-cares and mobility activity. He requires the use of a Hoyer lift at home to transfer in and out of his wheelchair. He could not live independently at home without this level of in-home skilled provider support. I believe Mr. Renshaw does meet criteria for the maximum amount of hours available to him through the Medicaid personal care provider program. He has to supplement that level of support with additional in-home provider support.

4. **Do you have an opinion, to a reasonable degree of medical certainty, as to Mr. Renshaw's life expectancy if he loses his home in foreclosure? If so, what is it?** The key issue here is that Mr. Renshaw requires consistent skilled care provider support which meets his personal medical and health needs. His current living situation maximizes that level of support. If he were to be admitted to a nursing home, he would be in an environment that has much higher risk of infection from both bacterial and viral sources. His emotional well-being would also be significantly impacted to the negative. From a medical perspective, his in-home living situation is his best case scenario.
5. **Do you have an opinion, to a reasonable degree of medical certainty, as to Mr. Renshaw's life expectancy should he move to a long-term care facility? If so, what is it?** As profiled above, it is very difficult for me to predict the life expectancy for Mr. Renshaw short of saying that his life expectancy is less now as a quadriplegic than it would be if he had not suffered a spinal cord injury. Specific to the theme of whether or not his life expectancy would be less in a long-term care facility versus his current home setting, I stand supportive to the theme that his best case scenario is to maintain his current living situation in his home setting from both a medical, as well as a psychological perspective.
6. **Do you know the approximate monthly cost of placing Mr. Renshaw in a long-term care facility? If so, what is it?** I do not have an answer for this question but certainly any nursing home in Boise will have a social worker on staff that can answer that question.
7. **Please elaborate on "Mr. Renshaw as a living example of how in-home skilled care can be tremendously cost effective to society both financially as well as psychologically."** After 21 years of practice here in Boise, Idaho as a rehabilitation physician specialist, Mr. Renshaw is the only patient I have in my practice who has been able to live in an independent home setting at his high level of cervical quadriplegia. All of my other patients with an injury at this level are residence in a long-term care facility. I am certain that the total cost of his in-home care combined with the cost of his medical care over the past 21 years is a small fraction of the cost that society would have incurred if he were a long-term resident in a nursing home facility.

Please feel free to contact me in the future if you have any further questions regarding Mr. Renshaw.

Sincerely,

Michael R. McMartin, M.D.

MRM/jr

BOISE PHYSICAL MEDICINE & REHABILITATION CLINIC

1000 North Curtis Road, Suite 202
Boise, Idaho 83706

(208) 377-3436
FAX (208) 377-3147

Michael R. McMartin, M.D. Rodde D. Cox, M.D. Vic Kadyan, M.D. Arden Mahaffey, D.O.

OFFICE RECHECK APPOINTMENT

PATIENT: Greg Renshaw

DATE OF APPOINTMENT: January 31, 2012

HISTORY OF PRESENT ILLNESS: Greg returns to clinic today for planned recheck. Since our last visit he has developed increasing difficulties with nighttime pain in the left ischial tuberosity area due to his bed mattress. He has a foam mattress in his bedroom which he sleeps on at nighttime. He also has a pressure relief bed that he acquired in 2003 in his living room. When he sleeps on the air mattress he has much less pain. He does not like to sleep on that bed, however, because of the difficulties with bed mobility and dressing due to the soft air mattress variable. When he's up in his chair he does not have buttock pain. Over the last 2-3 weeks this has become so intense that he's not sleeping at nighttime. He does take Opana ER for his baseline pain complaints as prescribed by Dr. Marsh and his colleagues. Greg denies any other new problems or concerns.

REVIEW OF SYSTEMS: Otherwise negative.

MEDICATIONS: I've reviewed his medications.

PHYSICAL EXAMINATION: On examination blood pressure 110/70, pulse 60, temperature 96.9. Neuro screen reveals no new focal deficits. Continued spastic quadriplegia. He has good control of his tone. I was unable to transfer him out of his wheelchair to examine his buttock area.

IMPRESSION/PLAN:

1. Quadriplegia: At baseline.
2. Left ischial tuberosity regional pain occurring at nighttime due to inadequate pressure relief from a foam mattress. Greg is at high risk for skin breakdown as exemplified by his previous decubitus ulcer requiring flap surgery. At this time, I have recommended that we obtain a new pressure relief bed mattress for use at home. I have given him a prescription for the same.
3. Follow-up: Greg will return to clinic in six months for planned recheck.

Michael R. McMartin, M.D.

MRM/jr

Jon Steele

From: Lynn Kelley <boisephysicalmed@qwest.net>
Sent: Wednesday, March 07, 2012 1:10 PM
To: Jon Steele
Subject: CV for Michael McMartin, MD
Attachments: MRM'sCV2009mrm[1].doc

Please see attached copy of the CV for Michael McMartin, MD.

I do not have any record of Dr. McMartin providing testimony over the past four years.

Thank you,

Lynn Kelley, FACMPE
Administrator
Boise Physical Medicine and Rehabilitation Clinic
1000 N. Curtis Rd. #202
Boise, ID 83706

208-377-3435

CURRICULUM VITAE

MICHAEL R. MCMARTIN, M.D.

OFFICE ADDRESS:

Boise PM&R Clinic
1000 North Curtis Road, Suite 202
Boise, ID 83706
(208) 377-3435
Fax: (208) 377-3147

EMPLOYMENT:

1991 to present - Boise Physical Medicine and Rehabilitation Clinic, President
1989 to 1991 - Solo practice, sole proprietor
1989 to present - Medical Director, Saint Alphonsus Regional Medical Center Rehabilitation Unit
1994 to present - Medical Director, Saint Alphonsus Regional Medical Center Subacute Rehabilitation Unit
July 1996 to present - Program Medical Director for Neuro Rehabilitation, Saint Alphonsus Ambulatory Rehabilitation Services (STAARS)

MEDICAL STAFF LEADERSHIP:

Member Foundation Board SARMC, Jan. 2008 to Present
Medical Staff President, Saint Alphonsus Regional Medical Center, Feb. 2005 to Feb. 2007
President Elect of Medical Staff - Saint Alphonsus Regional Medical Center, Feb. 2003 to Feb. 2005
Member Board of Trustees, Saint Alphonsus Regional Medical Center, Feb. 2005 to present
Chairman Traumatic Spine Subcommittee of the MEC Aug. 2003 to Aug. 2004
Member Quality Care and Professional Practices Committee Saint Alphonsus Regional Medical Center Feb. 2005 to Feb. 2007
Chairman Performance Values Committee Feb. 2003 to Feb. 2005

Member Performance Values Committee Feb. 2005 to Feb. 2007

MEDICAL STAFF LEADERSHIP CONTINUED:

Member Trauma Peer Review Committee Saint Alphonsus Regional Medical Center 2000 to present
Member Physician Advisory Board Saint Alphonsus Regional Medical Center Feb. 2003 to present
Member Medical Director Council Saint Alphonsus Regional Medical Center 1996 to present
Participant Advanced Medical Staff Leadership Retreats (Greeley, Co) 1998 to current
Participant Physician Leadership Academy 2005 to present (Quarterly)
Member Board of Directors Brain Injury Association of Idaho
Member BSU Nursing Advisory Board

EDUCATION:

Residency - Mayo Clinic Graduate School of Medicine Rochester, MN, Department of Physical Medicine and Rehabilitation, 1985 to 1989
Chief Resident, 1989
Admissions Committee, 1987 to 1989

Medical School - University of Colorado, 1981-1985
President, American Geriatrics Society National Medical School Chapter
President American Cancer Society, Medical School Chapter
Frank B. McGlone Award, Excellence in Geriatric Medicine

College - Stanford University 1976 - 1980
BA - Human Biology
Honors Recipient

PROFESSIONAL AFFILIATIONS:

Fellow, American Academy of Physical Medicine and Rehabilitation
Diplomat, American Board of Physical Medicine and Rehabilitation
Fellow, Physiatric Association of Spine, Sports, and Occupational Rehab
Diplomat, National Board of Medical Examiners
American Medical Association
Idaho Medical Association
Ada County Medical Society

Member Northwest Spine Society
American Paraplegia Society
Founder and Board Member Brain Injury Association of Idaho

LICENSURE & CERTIFICATION:

American Board of Physical Medicine and Rehabilitation, 1990
Medical Licensure: State of Idaho
Certified Independent Medical Examiner

RESEARCH & PRESENTTAIONS:

The Role of PM&R in Geriatric Medicine, Presentation American Academy of Physical Medicine and Rehabilitation, 1989
Steroid Use in High School Athletes; Publication Mayo Clinic; Presentation American Academy of Physical Medicine and Rehabilitation, 1988

Exhibit 39

JOHN L. RUNFT (ISB # 1059)
JON M. STEELE (ISB # 1911)
RUNFT & STEELE LAW OFFICES
1020 W. Main Street, Suite 400
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Phone: (208) 333-9495
Fax: (208) 343-3246
E-mail: JSteele@runftsteele.com

Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual, Plaintiff, vs. HOMECOMINGS FINANCIAL, LLC, a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware Limited Liability Company; DOES I-V, and ABC CORPORATIONS I-V, Defendants.	CASE NO. CV OC 1023898 **REBUTTAL EXPERT WITNESS DISCLOSURE**

COMES NOW Plaintiff, by and through his counsel of record, and discloses his rebuttal expert witness who may be called to testify at trial as follows:

1. Ritchie Eppink
Justice Architect
Idaho Legal Aid Services, Inc.
P.O. Box 453
Boise, Idaho 83701

(208) 345-0106

Mr. Eppink will testify as to his training and background. He will testify as to his *Memorandum Report*, dated May 10, 2012, attached as **Exhibit A**. Mr. Eppink has been engaged at the rate of $150 per hour. Mr. Eppink is available for his deposition upon proper notice and prepayment of his deposition charges.

At this stage of the litigation discovery remains ongoing and there may be additional information gleaned through discovery from Defendants to which Mr. Eppink would opine if that information had been previously produced. If such information is identified, Plaintiff reserves the right to provide this additional information Mr. Eppink, which may result in Amended and/or Updated Expert Reports.

Plaintiff reserves the right to call any expert witness identified, named or designated by any Defendant as set forth in their discovery responses and expert witness disclosures.

Plaintiff also reserves the right not to call any of the persons listed above.

Any of the persons identified above may be called for purposes of rebuttal and/or impeachment.

DATED this 10 day of May 2012.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of May 2012, a true and correct copy of the foregoing REBUTALL EXPERT WITNESS DISCLOSURE, was served upon opposing counsel as follows:

Matthew J. McGee
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Counsel for Homecomings, MERS, and Executive Trustee Services, LLC

____ US Mail
____ Personal Delivery
_X_ Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Plaintiff

EXHIBIT A

MEMORANDUM

TO: Jon Steele

FROM: Richard Alan Eppink

DATE: Thursday, May 10, 2012

RE: *Renshaw v. Homecomings Financial, LLC*, Ada County case no. CV OC 1023898

* * * * *

You have asked me to review materials related to the nonjudicial foreclosure concerning your client Gregory Renshaw's home. That home and aborted foreclosure are the subject of the case I've referenced above. I've conducted a review of materials from the records of Ada County, the papers on file in that case, and written discovery responses and document production in that case, and I have reached several conclusions. This memorandum describes those conclusions.

Background and Experience

My review, analysis, and conclusions concerning the aborted foreclosure concerning Mr. Renshaw's home are based on my education, training, and experience in real estate and foreclosure law. I am an attorney licensed to practice law since 2006 in the State of Idaho and before all Idaho state courts and the United States District and Bankruptcy courts for the District of Idaho. Presently, I practice as the Legal Director of the American Civil Liberties Union Foundation of Idaho and as the Justice Architect for Idaho Legal Aid Services. Throughout my career as an attorney, I have practiced extensively in, and with a special focus on, housing and foreclosure law. As Staff Attorney, and then Justice Architect, for Idaho Legal Aid Services, I have represented and advised dozens of families and individuals threatened with the loss of their homes through nonjudicial foreclosure. In order to provide competent and effective advice and representation, I have accordingly conducted dozens of reviews of pending or completed

foreclosures such as Mr. Renshaw's. In many instances, I have determined from those reviews that a foreclosure has been conducted lawfully and properly. In other cases, however, I have identified violations of law on the part of entities pursuing the foreclosure, as well as examples of negligence, misrepresentation, fraud, and deceptive or unconscionable practices on the part of foreclosing entities. My findings appear to be consistent with the findings of many federal and state regulatory agencies, such as the Inspector General of the U.S. Department of Housing and Urban Development and 49 state attorneys general, concerning mortgage foreclosure practices during the past several years.

As a result of my experience with the law and practice of housing and nonjudicial real estate foreclosure in Idaho, I have been asked on numerous occasions to provide training and technical assistance to others on that topic. I have delivered presentations and Continuing Legal Education seminars on housing or foreclosure law to, among others, the national Housing Justice Network, the Idaho Trial Lawyers Association, the Idaho State Bar, the Idaho Mediation Association, the National Consumer Law Center and CFED, and as part of the graduate Public Policy and Administration curriculum at Boise State University. I continuously monitor changes to the statutes and other laws governing foreclosure in Idaho, and I am aware of amendments to the Idaho trust deed statutes over the past several years. Indeed, Idaho legislators have requested my technical assistance in analyzing and formulating several of those amendments, and I have also provided technical assistance, about nonjudicial foreclosure in Idaho, to the American Arbitration Association at its request.

Prior to practicing law, I earned a Bachelor of Science Degree in Computer Science, with distinction, from the University of Virginia, and a Juris Doctorate, *summa cum laude*, from the University of Idaho College of Law, serving as a Managing Editor of the *Idaho Law Review* and

graduating ranked first out of all students in my class. I was selected for and completed a Fulbright Fellowship, the United States government's flagship research exchange program, after finishing law school.

Scope of Review

To conduct my review of the aborted foreclosure concerning Mr. Renshaw's home, I examined materials including the following:

Records of Ada County, including:

Warranty Deed (recorded Jan. 22, 1991)

Judgment and Decree of Divorce (recorded Oct. 21, 1998)

Quitclaim Deed (recorded July 3, 2007)

Deed of Trust (recorded July 3, 2007)

Appointment of Successor Trustee (recorded August 13, 2010)

Notice of Default and Election to Sell under Deed of Trust (recorded August 13, 2010)

Affidavits (recorded December 1, 2010)

Lis Pendens (recorded December 9, 2010)

Rescission of Notice of Default (recorded August 3, 2011)

Interest-Only Period Adjustable Rate Note dated June 27, 2007 (HF000431–435) and Allonge (HF000430)

Defendant Mortgage Electronic Registration Systems, Inc.'s Answers and Responses to Plaintiff's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission in this case

MERS System Rules of Membership, "vJune2009" and [March 2012] version

MERS bulletins and announcements

Decisions and opinions of state and federal courts concerning pertinent issues

Reports and findings of governmental, regulatory, and independent investigations of mortgage foreclosure practices

Amended Complaint in this case

Decision and briefs concerning summary judgment motions in this case

Defendants' Expert Witness Disclosure (re: Steven C. Hardesty) in this case

I have reviewed these materials to determine whether there may have been violations of the Idaho trust deed statutes or other law governing nonjudicial foreclosure in Idaho, to determine whether the entities pursuing foreclosure concerning Mr. Renshaw's home pursued that foreclosure with reasonable care and without negligence, and to determine whether I agree or disagree with any conclusions reached by Steven Hardesty, who has been disclosed as an expert witness in this case.

Conclusions

Based upon my experience, training, education, and review of pertinent documents and materials, I have reached the following opinions and conclusions.

Failure to record assignments

Under I.C. § 45-1505(1), a trustee under a trust deed may not foreclose that trust deed if any assignments of the trust deed have not been recorded in mortgage records in the counties where the property described in the deed are situated. In contrast to certain procedural requirements set out at I.C. § 45-1506, the Idaho Supreme Court has clearly and multiple times held that I.C. § 45-1505 sets forth mandatory requirements with which a foreclosing entity must

strictly comply. Failure to comply with these requirements would even result in the voiding of a completed trustee's sale, according to the Court.

Although an appointment of a successor trustee instrument was apparently recorded on August 13, 2010, concerning the trust deed involved in this case, I have been unable to locate an assignment of that trust deed, either from the lender, Homecomings Financial, LLC, or the purported "beneficiary" of that trust deed, Mortgage Electronic Registration Systems, Inc. ("MERS"). According to MERS's interrogatory answers and admissions in this case, MERS is not in fact or law the beneficiary of the trust deed. Apparently, Homecomings Financial, LLC, had no interest in the trust deed at the time foreclosure under the Idaho Trust Deed Act (I.C. §§ 45-1502–1515) was commenced, and MERS had no interest other than a sham interest in the trust deed at time. This violation of I.C. § 45-1505 would make any resulting trustee's sale voidable.

The violation is especially egregious considering how simply it could have been avoided. Recording an assignment of the trust deed, to put the borrower on notice of the entities actually interested in the trust deed and pursuing foreclosure, would have cost about $10 to $15 in Ada County and been a routine operation for the entities involved. Instead, the borrower was given a "notice" of default that listed MERS and Homecomings Financial, LLC—the two entities *no longer involved*. This notice would likely cause the borrower to misunderstand or be confused about the entities involved in the trust deed and debt.

I understand that Steven Hardesty, an expert witness that MERS expects to testify at trial in this case, may rely on MERS's "Rules of Membership" in effect in 2010 to support his opinion that a failure to comply with I.C. § 45-1505 would not "cloud" the chain of title to the property involved. I am familiar with the MERS Rules of Membership in effect in 2010, as well

as those now in effect. They are private, internal standards that may be contractual covenants governing MERS members and other beneficiaries of MERS memberships, but they do not preempt state law. MERS apparently recognized this in early 2011, requiring MERS members to execute and record assignments from MERS to the actual beneficiary before pursuing foreclosure, and then changing its Rules of Membership to make that requirement clear.

Improper use of MERS

Had an assignment of the trust deed from MERS to an actual beneficiary been executed and recorded, serious questions would still remain about compliance with I.C. § 45-1505 and the clarity of the chain of title. Because MERS may have never had an interest in the trust deed, it may have been merely a sham beneficiary from the start.[1] If so, any assignment of the trust deed from MERS would not have the intended legal effect of transferring beneficiary status. Even if it did, it would be misleading and confusing to the borrower.

---

[1] This question was at issue in *Trotter v. Bank of N.Y. Mellon*, but the Idaho Supreme Court did not decide it. ___ Idaho ___, ___, No. 38022, 2012 Ida. LEXIS 84 at *12–*13 (Idaho Mar. 23, 2012). Unfortunately, the borrower in that case, proceeding *pro se*, was unable to present cogent argument on the issue. Creditors and foreclosing entities have benefited from borrowers' inability to access effective legal representation. As one court put it:

> This Court has extensive experience with all manner of mortgage related lawsuits filed over the past four or five years. In the Court's experience, many of these cases are filed by pro se litigants. To the degree that attorneys are involved, representation on both sides is often best characterized as barely adequate - or worse. With this in mind, it is not very helpful to be faced with multiplicitous citations to what various district court judges have done with issues allegedly similar to those raised here because the Court has little or no confidence that the issues were competently argued or the facts accurately described. This is not to criticize the district judges presiding over those cases; it is only to recognize the handicaps we all face in attempting to resolve these issues in accordance with the facts and the law.

In re Citimortgage, Inc. Home Affordable Modification Program ("HAMP") Litigation, No. ML 11-2274 DSF (PLAx), Order Granting in Part and Denying in Part Motion to Dismiss n.1 (April 17, 2012) (Dkt. 67).

Entitlement of foreclosing entity to enforce the note

Aside from the absence of any recorded assignment of the trust deed involved in this case, it is not clear which entities have been entitled to enforce the promissory note involved. Articles 3 and 9 of the Uniform Commercial Code as adopted in Idaho (Chapters 3 and 9, Title 28, Idaho Code) govern these questions. The documents I have reviewed suggest that MERS may have never been entitled to enforce the note. An attempt to foreclose, or completed foreclosure, by a person not entitled to enforce the note may be void or voidable, depending on the circumstances. Such an attempt or completed foreclosure may also violate other law, such as the federal Fair Debt Collection Practices Act or the Idaho Consumer Protection Act. Were the law otherwise, I could foreclose on homes I have no interest in, over debt I am not owed, with impunity.

Compliance with covenants in trust deed

The trust deed in this case, in particular section 22 of that instrument, includes covenants requiring notice and acts additional to the requirements of Idaho statutes. I have not located any notice or other document that appears to comply with the additional notice requirements of section 22 of the trust deed.

Careless or fraudulent document preparation

The instruments recorded in the Ada County records concerning this foreclosure bear indications that they were prepared by in a high-volume "document mill" setting. For instance, both the Appointment of Successor Trustee and the Notice of Default were purportedly executed on the same day, the former by a purported "Assistant Secretary" of MERS and the latter by a purported "authorized signatory" of Pioneer Title Company of Ada County. Yet both were notarized by the same California notary public. As another example, the Affidavits of Mailing

are dated August 27, 2010, and signed by an affiant claiming to have personally mailed certain documents on August 27, 2010, yet they were not notarized until more than two weeks later, on September 14, 2010. These circumstances suggest that "robosigning," as it has become popularly known, was involved in this foreclosure. Robosigning is merely a shorthand term for negligent, reckless, or fraudulent affidavit and instrument preparation, or for misfeasant or malfeasant acts or omissions by notaries public. The circumstantial evidence of robosigning in this case suggests additional violations of law and additional unfair or deceptive practices by the foreclosing entities.

Due care

Both individually and cumulatively, the practices in this foreclosure that I have identified above make it appear that the foreclosing entities' concern for their obligations to exercise due care and to comply with laws governing foreclosure and instrument preparation was lackadaisical at best. Given the gravity of the matter involved—a person's home—it is reasonable to require meaningful compliance with those obligations, and it would be unreasonable to permit shortcuts around basic statutory and common law requirements.

Harm to homeowners

The turmoil and anguish that foreclosure visits upon homeowners is hard to overestimate. I have met with many homeowners and tenants caught up in a foreclosure. Those homeowners who face the loss of their only permanent shelter almost always exhibit signs of extreme distress, often combined with physical symptoms of ill-health, deterioration of existing conditions, and exacerbation of disabilities. When careless, confusing, or deceptive practices or documents are involved in the foreclosure, this harm is often magnified due to the needless frustration created by the foreclosing entities. The home is a core concept in American life, recognized again and

again in both our legal traditions and modern jurisprudence as holding a very special, perhaps unique, sanctity. Because such a fundamental component of national, cultural, and personal identity is assaulted by the improper practices of foreclosing parties, it is no surprise that the harm those practices can cause is especially great.

Contact Information

Should you have any questions about anything in this memorandum, or if you would like me to examine any additional materials or analyze any other issues, please contact me:

Richard Alan Eppink
P.O. Box 453
Boise, ID 83701

Exhibit 40

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

IVAN HOOKER and KATHERINE HOOKER,

Plaintiffs,

Civ. No. 10-3111-PA

ORDER

v.

NORTHWEST TRUSTEE SERVICES, INC.; BANK OF AMERICA, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendants.

PANNER, J.

Before the court is a motion to dismiss (#8) and request for judicial notice (#6) by Bank of America, N.A. and Mortgage Electronic Registration Systems, Inc. (MERS).[1] Defendants' request for judicial notice is GRANTED. Defendants' motion to dismiss is DENIED. Plaintiffs' request for a declaratory judgment is GRANTED.

---

[1]Plaintiffs dismissed their claims against Northwest Trustee Services, Inc (Northwest).

BACKGROUND

Except where noted, the following background is from the complaint or judicially noticeable materials.

On November 17, 2005, plaintiffs obtained a loan from GN Mortgage, LLC. A trust deed secured the loan. The note and trust deed list GN as the lender. The trust deed lists MERS as the beneficiary. MERS is not listed on the note. The trust deed lists Regional Trustee Services Corp. as trustee. On November 23, 2005, the trust deed was recorded in the Jackson County land records.

In September 2009, plaintiffs defaulted. On May 3, 2010, MERS assigned the trust deed to Bank of America. Also on May 3, MERS appointed Northwest successor trustee. That same day, Northwest executed a notice of default and election to sell. On May 7, 2010, defendants recorded the May 3 assignment of the trust deed, appointment of successor trustee, and notice of default and election to sell.

On September 7, 2010, plaintiffs filed the complaint in state court. On September 13, 2010, Wells Fargo Bank, N.A., as attorney in fact for Bank of America, appointed Northwest successor trustee. On September 16, 2010, Northwest executed a rescission of the notice of default recorded on May 7, 2010. Also on September 16, 2010, Northwest executed a second notice of default and election to sell. On September 20, 2010, defendants recorded the September 16, 2010 appointment, rescission, and

second notice of default.

On October 7, 2010, defendants removed the case to this court. On January 19, 2011, pursuant to my order, defendants submitted a complete chain of title for the note and trust deed. Defendants' chain of title included a copy of a January 3, 2011 "MIN Summary and Milestones." (Jan. 31, 2011 McCarthy Decl., Ex. 1, 1-2.) The MIN Summary is how MERS members track transfers of servicing and ownership rights of loans within the MERS system. According to the MIN Summary, on December 9, 2005, Guaranty Bank, FSB transferred the beneficial interest in the trust deed to Wells Fargo Home Mortgage. (Jan. 31, 2011 McCarthy Decl., Ex. 1, 1-2.) Although Guaranty Bank appears to have been the original servicer of the loan, the record is silent as to how or when Guaranty Bank obtained the beneficial interest in the trust deed.

On December 14, 2005, Guaranty Bank transferred the servicing rights to Wells Fargo Home Mortgage. (Jan. 31, 2011 McCarthy Decl., Ex. 1, 2.) On July 15, 2006, Wells Fargo Home Mortgage transferred the beneficial interest in the trust deed to Bank of America. (Jan. 31, 2011 McCarthy Decl., Ex. 1, 2.) Defendants did not record the transfer of the beneficial interest in the trust deed from Guaranty Bank to Wells Fargo or from Wells Fargo to Bank of America in the Jackson County land records. As noted above, defendants did record a May 3, 2010 assignment of the trust deed from MERS to Bank of America.

STANDARDS

On a motion to dismiss, the court reviews the sufficiency of the complaint. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). This review is generally limited to the allegations in the complaint, exhibits attached to the complaint, and judicially noticeable materials. Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007). To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain sufficient facts that "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009). This plausibility standard requires the pleader to present facts that demonstrate "more than a sheer possibility" that defendant is liable for the alleged misconduct. Id.

In considering a motion to dismiss, a court must distinguish between the factual allegations and legal conclusions asserted in the complaint. Id. All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. American Family Ass'n, Inc. v. City & County of San Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002). At the pleadings stage, "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Therefore, if the well-pleaded factual allegations plausibly give rise to the relief sought, a court shall deny the motion to dismiss. Iqbal, 129 S.Ct. at 1950.

DISCUSSION

I. Judicial Notice

Federal Rule of Evidence 201 states that a court may take judicial notice of a fact outside the pleadings if the fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001), impliedly overruled on other grounds as discussed in Gallardo v. Dicarlo, 203 F.Supp.2d 1160, 1162 n.2 (C.D. Cal. 2002). Defendants request the court take judicial notice of the following documents recorded September 20, 2010: (1) rescission of the May 3, 2010 notice of default and election to sell; (2) September 13, 2010 appointment of successor trustee; and (3) September 16, 2010 notice of default and election to sell. Each document is recorded in the Jackson County land records. Defendants' request for judicial notice (#6) is GRANTED.

II. Motion to Dismiss

Under the Oregon Trust Deed Act, "'Beneficiary' means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or the person's successor in interest . . . ." ORS 86.705(1). The trust deed at issue states:

> The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS.

> This security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note.
>
> . . .
>
> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument.

(Notice of Removal, Ex. 1, 8 (emphasis added).)

Although the trust deed lists MERS as the nominal beneficiary "solely as a nominee for Lender . . .," (Notice of Removal, Ex. 1, 7), the deed makes clear that MERS is not "the person for whose benefit a trust deed is given," ORS 86.705(1). Instead, the trust deed confirms that GN holds the beneficial interest. The trust deed lists GN, not MERS, as "Lender." (Notice of Removal, Ex. 1, 6.) All payments on the loan are owed to GN, not MERS. (Notice of Removal, Ex. 1, 8.) GN, not MERS, "may invoke the power of sale and any other remedies permitted by Applicable Law." (Notice of Removal, Ex. 1, 18, ¶ 22.)

While the trust deed lists MERS as the nominal beneficiary, the trust deed does not authorize MERS to take any actions on its own behalf. First, MERS holds only legal title to the trust deed. (Notice of Removal, Ex. 1, 8.) Second, MERS acts solely as

nominee for GN. (Notice of Removal, Ex. 1, 7-8.) Finally, MERS may act as GN's nominee only "if necessary to comply with law or custom[.]" (Notice of Removal, Ex. 1, 8.) The trust deed emphasizes that MERS is not the beneficiary, but rather the nominee or agent of the lender. Because the trust deed clearly demonstrates GN, and not MERS, is the person for whose benefit the trust deed was given, GN (or its successor in interest) is the beneficiary of the trust deed. ORS 86.705(1); see In re McCoy, 2011 WL 477820, at *3 (Bankr. D. Or. Feb. 7).[2]

That MERS was the agent or nominee of the beneficiary does not mean the non-judicial foreclosure proceedings necessarily violated Oregon law. See In re McCoy, 2011 WL 477820, at *4. As in other recent cases in this district, "The problem that defendants run into in this case is an apparent failure to record assignments necessary for the foreclosure." Burgett v. MERS, 2010 WL 4282105, at *3 (D. Or. Oct. 20); see also In re McCoy, 2011 WL 477820, at *4. In Oregon, a trustee may conduct a non-judicial foreclosure sale only if:

> The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in the mortgage records

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[2]The note reinforces my conclusion that plaintiffs granted the trust deed for the benefit of GN, not MERS. The note states the trust deed "protects the Note Holder from possible losses that might result if I do not keep the promises that I make in this Note." (Notice of Removal, Ex. 1, 28, ¶ 11.) GN, not MERS, is the "Note Holder." (Notice of Removal, Ex. 1, 26, ¶ 1.) MERS is not mentioned in the note.

> in the counties in which the property described in the deed is situated . . . .

ORS 86.735(1)(emphasis added).

Should the beneficiary choose to initiate non-judicial foreclosure proceedings, the Act's recording requirements mandate the recording of any assignments of the beneficial interest in the trust deed. Burgett, 2010 WL 4282105, at *2; In re McCoy, 2011 WL 477820, at *3. Defendants appear to argue that rather than requiring the recording of every assignment of the trust deed, the Act allows defendants to instead track every assignment of the trust deed within the MERS system, recording only the final assignment of the trust deed in the county land records. Because the Oregon Trust Deed Act requires the recording of all assignments by the beneficiary, defendants' argument fails. ORS 86.735(1); see In re McCoy, 2011 WL 477820, at *3-4.

Oregon's recording requirement is consistent with the longstanding rule that the trust deed or mortgage generally follows the note. Carpenter v. Longan, 83 U.S. 271, 274 (1872); U.S. Nat'l Bank of Portland v. Holton, 99 Or. 419, 427-29, 195 P. 823, 826 (1921)(collecting cases). As noted by defendants, "the assignment of the note automatically assigns the underlying interest in the trust deed because MERS is nominee for whichever entity is the owner (if the owner is a MERS member)." (Defs.' Reply, 10.) Defendants also state, "the content of the deed of trust itself . . . established the parties' intent that the trust

deed, and MERS' agency relationship, follow the note." (Id. at 11.) In fact, the trust deed expressly states, "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower." (Notice of Removal, Ex. 1, 16, ¶ 20(emphasis added).) If there were transfers of the beneficial interest in the trust deed, defendants were required to record those transfers prior to initiating a non-judicial foreclosure in the manner provided in ORS 86.740 to 86.755. ORS 86.735(1).

Considering what is commonly known about the MERS system and the secondary market in mortgage loans, plaintiffs allege sufficient facts to make clear that defendants violated the Oregon Trust Deed Act by failing to record all assignments of the trust deed.[3] Therefore, defendants' motion to dismiss is DENIED.

The record demonstrates that in addition to requiring the denial of defendants' motion to dismiss, plaintiffs are entitled to declaratory relief. Pursuant to my order, defendants submitted the MIN Summary and Milestones for the loan at issue. The MIN Summary demonstrates that on December 9, 2005, Guaranty Bank, FSB transferred the beneficial interest in the trust deed to Wells

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[3]For background information on MERS, see generally Gerald Korngold, Legal and Policy Choices in the Aftermath of the Subprime and Mortgage FiNancing Crisis, 60 S.C. L. Rev. 727, 741-42 (Spring 2009) and Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, 78 U. Cin. L. Rev. 1359, 1368-1374 (Summer 2010).

Fargo Home Mortgage. (Jan. 31, 2011 McCarthy Decl., Ex. 1, 2.) As noted above, the record is silent as to how or when Guaranty Bank acquired any interest in the loan. On July 15, 2006, Wells Fargo transferred the beneficial interest in the trust deed to Bank of America. (Jan. 31, 2011 McCarthy Decl., Ex. 1, 2.) Defendants did not record Guaranty Bank's transfer of the beneficial interest in the trust deed to Wells Fargo. Defendants' chain of title submission therefore demonstrates that defendants violated ORS 86.735(1) by initiating non-judicial foreclosure proceedings prior to recording all assignments of the trust deed in the Jackson County land records.

While I recognize that plaintiffs have failed to make any payments on the note since September 2009, that failure does not permit defendants to violate Oregon law regulating non-judicial foreclosure. The Oregon Trust Deed Act "represents a well-coordinated statutory scheme to protect grantors from the unauthorized foreclosure and wrongful sale of property, while at the same time providing creditors with a quick and efficient remedy against a defaulting grantor." Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corp., 209 Or.App. 528, 542, 149 P.3d 150, 157 (2006). In part due to the legislature's desire "to protect the grantor against the unauthorized loss of its property," a party conducting a non-judicial foreclosure must demonstrate strict compliance with the Act. Id. As demonstrated

above, the MIN Summary demonstrates defendants failed to comply with the Oregon Trust Deed Act.

Although not affecting my conclusion here, the MIN Summary raises an additional concern relevant to numerous cases pending before me. As noted above, GN is listed as Lender on both the trust deed and the note. The MIN Summary, however, makes no mention of GN. In fact, the MIN Summary is silent as to how or when Guaranty Bank became an "Investor" holding the beneficial interest in the trust deed. (Jan. 31, 2011 McCarthy Decl., Ex. 1, 2.) The MIN Summary indicates only that on December 1, 2005, Guaranty Bank registered the loan in the MERS system. What occurred before registration, and how or when Guaranty Bank obtained any interest in the loan (from GN or another) is not revealed.

The apparent gap in the chain of title is not the only issue that causes me concern. On May 7, 2010, defendants recorded: (1) an assignment of the trust deed from MERS to Bank of America; (2) MERS's appointment of Northwest as successor trustee; and (3) a notice of default and election to sell. Regarding the May 7 recordings, defendants state, "After receiving plaintiffs' complaint, Northwest Trustee Services, Inc. recognized that certain documents were recorded out-of-order." (Oct. 14, 2010 Mem. Supp. Mot. Dismiss, 4.) Upon recognizing the problems - after initiating non-judicial foreclosure proceedings and only

after receiving plaintiffs' complaint alleging improper recordings - defendants rescinded the May 7, 2010 notice of default and election to sell. The "out-of-order" recordings demonstrate problems, not atypical in my view, often caused by foreclosing parties rushing to expedite non-judicial foreclosures.

On May 3, 2010, a "Vice President" of MERS assigned the trust deed to Bank of America. (Notice of Removal, Ex. 1, 32.) That same day, another "Vice President" of MERS appointed Northwest successor trustee. (Notice of Removal, Ex. 1, 34.) Also on May 3, 2010, an "Assistant Vice President" of Northwest signed the notice of default and election to sell. (Notice of Removal, Ex. 1, 36-37.) The same notary public apparently witnessed all three executives sign the documents on the same day. Considering defendants relied on the May 3, 2010 documents to justify non-judicial foreclosure proceedings, defendants' document review appears rushed. Considering the time spent reviewing the documents, assigning the trust deed, appointing a successor trustee, and issuing a notice of default and election to sell, I am not surprised to learn that "[a]fter receiving plaintiffs' complaint, Northwest Trustee Services, Inc. recognized that certain documents were recorded out-of-order."

Notwithstanding the above concerns, I note the May 3, 2010 assignment states that MERS assigns "all beneficial interest" in

the trust deed to Bank of America. (Notice of Removal, Ex. 1, 32.) As explained above, MERS never had any beneficial interest in the trust deed. MERS held only legal title as an agent or nominee of GN (or GN's successors). If MERS acted only as an agent or nominee, why is the principal not identified in the May 3, 2010 assignment? The confusion is heightened as the MIN Summary demonstrates at least two unrecorded transfers of the beneficial interest in the trust deed occurred before May 3, 2010. As Justice Page of the Supreme Court of Minnesota summarized:

> MERS claims to hold legal title, but only legal title, to the mortgage being foreclosed. MERS also claims that in foreclosing mortgages it acts only as nominee for its members. But MERS can act as nominee for only the particular MERS member who holds the promissory note at any particular time and, when that promissory note is assigned between members, the member for which MERS acts as nominee, and on whose behalf MERS holds legal title, necessarily changes. In other words, the entity on whose behalf MERS holds legal title to the mortgage changes every time the promissory note is assigned.

Jackson v. Mortgage Electronic Registration Systems, Inc., 770 N.W.2d 487, 503-04 (Minn. 2009)(Page, J., dissenting). Although Justice Page wrote in dissent in a case involving a Minnesota statute, his concerns apply to numerous cases pending before me.

Foreclosure by advertisement and sale, which is designed to take place outside of any judicial review, necessarily relies on the foreclosing party to accurately review and assess its own authority to foreclose. Considering that the non-judicial

foreclosure of one's home is a particularly harsh event, and given the numerous problems I see in nearly every non-judicial foreclosure case I preside over, a procedure relying on a bank or trustee to self-assess its own authority to foreclose is deeply troubling to me.

I recognize that MERS, and its registered bank users, created much of the confusion involved in the foreclosure process. By listing a nominal beneficiary that is clearly described in the trust deed as anything but the actual beneficiary, the MERS system creates confusion as to who has the authority to do what with the trust deed. The MERS system raises serious concerns regarding the appropriateness and validity of foreclosure by advertisement and sale outside of any judicial proceeding.

Additionally, the MERS system allowed the rise of the secondary market and securitization of home loans. A lender intending to immediately sell a loan on the secondary market is not concerned with the risk involved in the loan, but with the fees generated. If a lender aims to quickly pass a loan off onto an investor, a stated-income loan appears not as an unacceptable risk, but as an income stream. MERS makes it much more difficult for all parties to discover who "owns" the loan. When a borrower on the verge of default cannot find out who has the authority to modify the loan, a modification or a short sale, even if

beneficial to both the borrower and the beneficiary, cannot occur.

When no borrowers default, the problems inherent in the MERS system may go unnoticed. Unfortunately for banks, borrowers, investors, and courts throughout the country, many borrowers are now defaulting. Countless grantors of trust deeds now face the harsh prospect of losing a home outside of any judicial proceeding. At the same time, the MERS system greatly increased the number of investors stuck holding worthless notes. A lender that knows it will immediately sell a loan on the secondary market has no incentive to ensure the appraisal of the security is accurate. Similarly, the lender need not concern itself with the veracity of any representations made to the borrower. In short, the MERS system allows the lender to shirk its traditional due diligence duties. The requirement under Oregon law that all assignments be recorded prior to a non-judicial foreclosure is sound public policy:

> [I]t is apparent with the benefit of hindsight that the ability of lenders to freely and anonymously transfer notes among themselves facilitated, if not created, the financial banking crisis in which our country currently finds itself. It is not only borrowers but also other lenders who rightfully are interested in who has held a particular promissory note. For example, a lender who holds a promissory note that has become worthless may have an interest in knowing the hands through which that note passed.

Jackson, 770 N.W.2d at 504 (Page, J., dissenting). Justice Page wrote in dissent, but his views are persuasive.

Although the concerns raised in this order appear in many foreclosure cases pending before me, I resolve the current controversy on narrow grounds. Following defendants' removal of the complaint, plaintiffs still seek declaratory relief that defendants' non-judicial foreclosure is wrongful. I agree with Judge Alley that "Oregon law permits foreclosure without the benefit of a judicial proceeding only when the interest of the beneficiary is clearly documented in a public record." In re McCoy, 2011 WL 477820, at *4. Because defendants failed to record all assignments of the trust deed, the non-judicial foreclosure proceedings violated the Oregon Trust Deed Act. Therefore, plaintiffs are entitled to declaratory relief on that claim.

CONCLUSION

Defendants' request for judicial notice (#6) is GRANTED. Defendants' motion to dismiss (#8) is DENIED. Plaintiffs are entitled to a declaratory judgment stating defendants violated ORS 86.735(1). This non-judicial foreclosure proceeding is dismissed. Judgement and costs for plaintiffs.

IT IS SO ORDERED.

DATED this 25 day of May, 2011.

OWEN M. PANNER
U.S. DISTRICT JUDGE

Exhibit 41

No. 11-35534

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IVAN HOOKER; KATHERINE HOOKER,

Plaintiffs-Appellees,

v.

NORTHWEST TRUSTEE SERVICES, INC.,

Defendant,

and,

BANK OF AMERICA, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,

Defendants-Appellants

BRIEF OF AMICUS CURIAE STATE OF OREGON, SUPPORTING APPELLEES' BRIEF AND AFFIRMANCE OF THE DISTRICT COURT'S JUDGMENT

Appeal from the United States District Court
for the District of Oregon

Continued...

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AMICUS BRIEF

THE STATE OF OREGON'S BASIS FOR APPEARING, AND ITS INTEREST IN THE CASE

The State of Oregon files this brief under Fed. R. App. P. 29(a), which permits a state to file an amicus brief without the court's leave or the parties' consent.

This case involves the correct construction of Oregon Revised Statute § 86.735(1), which identifies the circumstances in which a nonjudicial foreclosure may commence against a homeowner. Construing § 86.735(1) correctly will ensure that Oregon's nonjudicial foreclosure process operates as the Oregon Legislature intended—in a manner that fosters confidence among home owners and purchasers by making pertinent information easily accessible; and in a manner that is equitable and efficient for homeowners, lenders, and other affected parties. Because the correct construction of § 86.735(1) is important to the State of Oregon and its citizens, this brief focuses on that provision and its meaning.

ARGUMENT

The factual scenario that prompted this lawsuit has become increasingly common in Oregon. Plaintiffs borrowed money to buy property. They signed a promissory note, agreeing to repay the borrowed amount plus interest to the lender, and they signed a Deed of Trust that identified the property as security

for the loan. Plaintiffs defaulted on the promissory note, and the deed's trustee initiated a nonjudicial foreclosure. By then, the initial lender (the trust deed's initial "beneficiary") no longer owned the promissory note. Although the note had been transferred to new owners multiple times, not all of the transfers had been recorded in county records.[1] Consequently, the district court ruled that Or. Rev. Stat. § 86.735(1)—which requires all "assignments of the trust deed by . . . the [deed's] beneficiary" to be recorded prior to a nonjudicial foreclosure—precluded a nonjudicial foreclosure, and it dismissed the foreclosure proceedings. (E.R. 2-3, 7-8, 16, Order).

The district court correctly construed § 86.735(1). Promissory-note transfers shift the security interest in a trust deed from the deed's current beneficiary to a new beneficiary, and they thus qualify as "assignments of the trust deed by . . . the beneficiary." As a result, § 86.735(1) requires them to be recorded before a nonjudicial foreclosure can commence.[2]

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[1] As defendants note, unrecorded transfers occurred on December 9, 2005 (when Guaranty Bank transferred the promissory note to Wells Fargo) and on July 15, 2006 (when Wells Fargo transferred the note to Bank of America). (Br. 13).

[2] Oregon statutes do not appear to define "assignment" or "transfer." Both terms generally connote the conveyance of rights from one entity to another. *See Black's Law Dictionary* (9th ed. 2009) at 135 (defining "assign," in part, as "[t]o convey; to transfer rights or property," as in "the bank assigned the note to a thrift institution"); *James v. Recontrust Company*, ___ F. Supp. 2d

Footnote continued...

As in many other foreclosure cases in Oregon, this case also involves Mortgage Electronic Registration Systems, Inc. (MERS). The trust deed identified MERS as the "nominee" for the initial lender and its "successors and assigns." Defendants argue that, because the deed further described MERS as the deed's "beneficiary," the promissory-note transfers did not alter the beneficiary's identity, and § 86.735(1) did not require the transfers to be recorded. (Br. 15-16). Yet defendants' premise is at odds with Oregon law. Because the deed's declared purpose was to secure the loan's repayment to the initial lender and its successors, the lender and its successors—not MERS—were the deed's beneficiaries under Oregon law. Read as a whole, the deed demonstrates that MERS was merely an agent authorized to do things for the benefit of the deed's true beneficiaries. Because the beneficiary's identity shifted with each promissory-note transfer, § 86.735(1)'s recording requirements applied to those transfers.[3]

(...continued)
___, 2012 WL 653871, *3 (D. Or. 2012) ("[t]he transfer of a security instrument is called an 'assignment'"), citing G. Nelson and D. Whitman, *Real Estate Finance Law* § 5.27, p. 530 (5th ed. 2007).

[3] If this court concludes that the state-law question presented by this case is potentially dispositive, certifying the question to the Oregon Supreme Court would be appropriate. *See* Or. Rev. Stat. § 28.200 (Oregon Supreme Court "may answer questions of [state] law certified to it by" a federal Court of Appeals if any such question "may be determinative of the cause then pending

Footnote continued...

A. Or. Rev. Stat. § 86.735(1) requires promissory-note transfers to be recorded prior to a nonjudicial foreclosure.

In construing Oregon statutes, courts must "discern the intent of the legislature." *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610, 859 P.2d 1143 (1993). Courts first examine "text and context." *State v. Gaines*, 346 Or. 160, 171, 206 P.3d 1042 (2009). Statutory text is "the best evidence of the legislature's intent" and courts—in reviewing statutory text—"consider[] rules of construction . . . that bear directly on how to read the text." *PGE*, 317 Or. at 610-11. "Some of those rules are mandated by statute, including" Or. Rev. Stat. §174.010's directive "not to insert what has been omitted, or to omit what has been inserted." *PGE*, 317 Or. at 611; *see also* Or. Rev. Stat. § 174.010 ("where there are several provisions or particulars [within a statute] such construction is, if possible, to be adopted as will give effect to all"). Statutory context "includes other provisions of the same statute and other related statutes." *PGE*, 317 Or. at 611.

Second, courts consider legislative history. *Gaines*, 346 Or. at 172. "[A] party is free to proffer legislative history to the court" and—so long as the history "appears useful"—the "court will consult it after examining text and

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(...continued)
in the certifying court," and if "no controlling precedent" exists on the issue in Oregon's appellate courts).

context, even if the court does not perceive an ambiguity in the statute's text." *Gaines*, 346 Or. at 172.

Third, "[i]f the legislature's intent remains unclear" at that point, courts "may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Gaines*, 346 Or. at 172.

The pertinent methodology reveals that Or. Rev. Stat. § 86.735(1) requires promissory-note transfers to be recorded before a nonjudicial foreclosure may commence. The methodology further reveals that, under Oregon law, MERS was not the trust deed's "beneficiary."

1. Text and context show that Or. Rev. Stat. § 86.735(1) requires promissory-note transfers to be recorded.

Or. Rev. Stat. § 86.735 requires all "assignments of the trust deed by . . . the beneficiary" to be recorded prior to a nonjudicial foreclosure:

> The trustee may foreclose a trust deed by advertisement and sale in the manner provided in Or. Rev. Stat. 86.740 to 86.755 if:
>
> (1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in the mortgage records in the counties in which the property described in the deed is situated[.]

Defendants appear to suggest that § 86.735(1)'s recording requirements simply do not encompass promissory-note transfers. (*See* Br. 39, asserting that under Oregon law, promissory-note transfers are not "even susceptible to recordation"). But as statutory text and context demonstrate, a promissory-note

transfer qualifies as an "assignment of the trust deed by . . . the beneficiary," and § 86.735(1)'s recording requirements apply to it.

a. That construction gives effect to each portion of § 86.735(1).

If a person borrows money to buy a property, the loan is commonly memorialized in a promissory note. Under Oregon law, the borrower and lender can "secure" the loan by creating a trust deed. Or. Rev. Stat. § 86.710. The trust deed creates two distinct interests. First, a trust deed "conveys an interest in real property" to the trustee, who generally is distinct from the lender. *See* § 86.705(7) (trust deed "conveys an interest in real property to a trustee in trust to secure the performance of an obligation"); § 86.705(8) ("[t]rustee" generally "means a person[] other than the beneficiary").

Second, a trust deed grants a security or "beneficial" interest to the initial lender. The lender is the deed's "beneficiary," "the person for whose benefit [the] trust deed is given." *See* Or. Rev. Stat. § 86.705(2) ("[b]eneficiary" is "a person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given"); § 86.705(7) (trust deed "secure[s] the performance of an obligation the grantor or other person named in the deed owes to a beneficiary"). All trust deeds thus create a beneficiary, and that beneficiary possesses a security or beneficial interest in the trust deed.

If the borrower repays the loan, "the trustee shall reconvey the estate of real property described in the trust deed" to the borrower. Or. Rev. Stat. §86.720(1). But if the borrower defaults, the beneficiary may "sell the property to satisfy the obligation," and may do so—assuming that § 86.735(1)'s "recording" requirements have been satisfied—without initiating a lawsuit. Or. Rev. Stat. §§ 86.735(2) and (3). Under those circumstances, "the trust deed . . . may be foreclosed by advertisement and sale," and the "power of sale is conferred upon the trustee." Or. Rev. Stat. § 86.710.[4]

Because a trust deed grants interests to two different entities, a trust deed can be "assigned"—as § 86.735(1) reflects—by either the trustee or the beneficiary. The trustee is free to assign its real-property interest and its rights as trustee to some other entity. Likewise, the beneficiary is free to assign its security or beneficial interest in the trust deed to another entity. The beneficiary does so by transferring the promissory note. When the note is transferred, the note's new holder necessarily becomes the deed's new "beneficiary." Because a promissory-note transfer shifts the security interest in the trust deed from the old beneficiary to a new beneficiary, it qualifies as an

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[4] A more complete discussion of §§ 86.705-86.990, and of Oregon real estate finance law generally, appears in the district court opinion in *James v. Recontrust Company*, 2012 WL 653871.

assignment of the trust deed by the beneficiary. It therefore must be recorded prior to a nonjudicial foreclosure.[5] *See* § 86.735(1) ("any assignments of the trust deed by the trustee or the beneficiary" must be recorded).

That construction gives effect to § 86.735(1)'s requirement that "any assignments of the trust deed by the trustee" be recorded, *and* gives effect to its requirement that "any assignments of the trust deed by . . . the beneficiary" be recorded. If, as defendants urge, § 86.735(1) does *not* require promissory-note transfers to be recorded, the requirement that "assignments of the trust deed by . . . the beneficiary" be recorded has no practical effect. Defendants have not identified any other type of act, aside from a promissory-note transfer, that might qualify as a beneficiary's "assignment[] of the trust deed." They have not suggested any other way—aside from adopting the state's construction—to

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[5] Nothing in § 86.735(1) suggests that the recording requirement can only be satisfied by a document that is expressly titled an "assignment" of the trust deed. If a promissory note is transferred, § 86.735(1) requires that the transfer be recorded in some fashion; that requirement could be satisfied by recording the document that effects the transfer, or by recording any other document that memorializes the transfer. Nothing in Oregon law suggests that an "assignment" needs to be in a particular form. *See Wittmayer v. Edwards*, 99 Or. App. 136, 139, 781 P.2d 866 (1989) (noting that "[a] present and binding appropriation of an interest in a specific fund is an assignment," and that an assignment "'may be oral or written and no special form is necessary provided that the transfer is clearly intended as a present assignment of the interest held by the assignor'"), quoting *Anderson v. Dept. of Justice*, 38 Or. App. 29, 32, 588 P.2d 1295 (1979).

give that phrase meaning.[6] Construing § 86.735(1) to *not* apply to promissory-note transfers, it follows, will violate the required methodology. *See* Or. Rev. Stat. § 174.010 ("where there are several provisions or particulars [within a statute] such construction is, if possible, to be adopted as will give effect to all"); *PGE*, 317 Or. at 611 (in construing text, courts must apply "the statutory enjoinder" found in Or. Rev. Stat. §174.010 "not to insert what has been omitted, or to omit what has been inserted").

b. Pre-1959 common law further demonstrates that promissory-note transfers must be recorded.

Statutory "[c]ontext includes the preexisting common law and the statutory framework within which [a] law was enacted." *Ram Technical Services, Inc. v. Koresko*, 346 Or. 215, 232, 208 P.3d 950 (2009) (internal

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[6] Defendants might suggest that § 86.735(1)'s reference to assignments of trust deeds by beneficiaries merely refers to a beneficiary's right to appoint a successor trustee. *See* Or. Rev. Stat. § 86.790(3) (authorizing beneficiary to appoint "another qualified trustee" "any time after the trust deed is executed"). That type of "assignment," however, is expressly referred to by a *different* phrase in § 86.735(1). *See* § 86.735(1) (requiring "any appointment of a successor trustee" to be recorded before a nonjudicial foreclosure may commence). But if the phrase "assignments of the trust deed by . . . the beneficiary" is construed to refer merely to a beneficiary's appointment of a successor trustee, the effect will be to render the same provision's later phrase—requiring the recording of "any appointment of a successor trustee"—superfluous, and without independent effect. The required methodology disfavors that construction. *See* Or. Rev. Stat. § 174.010 ("where there are several provisions or particulars [within a statute] such construction is, if possible, to be adopted as will give effect to all").

quotes omitted). Pre-existing common law shows that the 1959 Oregon Legislature—which created the nonjudicial foreclosure process and adopted § 86.735(1)—intended promissory-note transfers to be recorded prior to a nonjudicial foreclosure. *See FDIC v. Burdell*, 92 Or. App. 389, 392, 759 P.2d 282, *aff'd*, 307 Or. 285, 766 P.2d 1032 (1988) ("Oregon law first permitted trust deeds in 1959").

The 1959 Legislature would have understood that—under pre-existing law—transferring a promissory note necessarily transfers the security or beneficial interest in whatever instrument had secured the loan at issue. Under pre-1959 law, transferring a promissory note secured by a mortgage also accomplished the transfer of the mortgage.[7] In approving the use of trust deeds,

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[7] *See Holt v. Guaranty & Loan Co.*, 136 Or. 272, 282, 296 P. 852 (1931) ("[i]t has long been the law of this jurisdiction that the lawful assignment of a negotiable promissory note payment of which is secured by a mortgage carries with it the mortgage"); *Schleef v. Purdy et al*, 107 Or. 71, 78, 214 P. 137 (1923) ("transfer of the note, without any formal transfer of the mortgage, transfers the mortgage"); *U.S. Nat. Bank v. Holton*, 99 Or. 419, 428, 195 Pac. 823 (1921) ("to facilitate the transaction of business, [courts] have held that, for certain purposes, the mortgage is an incident of the note, and passes with it"), quoting *Kaiser v. Idleman*, 57 Or. 224, 108 P. 193 (1910); *Roth v. Troutdale Land Co.*, 83 Or. 500, 506-07, 162 P. 1069 (1917) ("[t]he indorsement and transfer by a mortgagee of a promissory note secured by a mortgage carries with it the mortgage security without a formal assignment of the mortgage"); *Stitt v. Stringham*, 55 Or. 89, 92, 105 P. 252 (1909) (even if objections to a written assignment of the mortgage were well taken, "still plaintiff has in evidence the note, duly indorsed by the personal representative

Footnote continued...

the 1959 Legislature generally described a trust deed as a "mortgage." *See* Or. Rev. Stat. § 86.715 ("[a] trust deed is deemed to be a mortgage on real property and is subject to all laws relating to mortgages on real property except to the extent that such laws are inconsistent with" §§ 86.705-86.795). By doing so, it signaled that—just as a promissory-note transfer transferred the lender's security interest in a mortgage under existing law—transferring a promissory note secured by a trust deed would create an analogous effect, by transferring the lender's security interest in the trust deed.

Nothing in § 86.735(1)'s text or context suggests that the legislature meant to abandon the common-law principles reflected in pre-1959 case law. The 1959 Legislature instead assumed, and intended, that transferring of a promissory note transfers the note holder's interest in the trust deed, and qualifies as an assignment of the trust deed. Accordingly, a promissory-note transfer must be recorded prior to a nonjudicial foreclosure.

c. Contrary to defendants' claim, other statutory provisions reflect that promissory-note transfers are recordable.

According to defendants, Or. Rev. Stat. § 93.610, § 93.630, and § 205.130 show that, in Oregon, promissory-note transfers are simply not

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of the payee thereof," and "that is sufficient to carry with it the ownership of the
Footnote continued...

"susceptible to recording in county land records." (App. Br. 8, 39). The cited provisions do not support that assertion.

Or. Rev. Stat. §§ 93.610 and 93.630 merely provide non-exclusive lists of some documents that—regardless of circumstances, and whether or not a party wishes to initiate a nonjudicial foreclosure—generally "shall" be recorded or indexed in county mortgage records.[8] Neither provision prohibits the recording of promissory-note transfers.

(...continued)
mortgage given to secure its payment").

[8] Or. Rev. Stat. § 93.610 provides:

> (1) Separate books shall be provided by the county clerk in each county for the recording of deeds and mortgages. In one book all deeds left with the clerk shall be recorded at full length, or as provided in ORS 93.780 to 93.800, with the certificates of acknowledgment or proof of their execution, and in the other all mortgages left with the county clerk shall in like manner be recorded. All other real property interests required or permitted by law to be recorded shall be recorded in the records maintained under ORS 205.130 or in records established under any other law.
>
> (2) Counties maintaining a consolidated index shall record deeds and mortgages and index them in the consolidated index in such a manner as to identify the entries as a deed or mortgage record. All other real property interests required or permitted by law to be recorded shall be recorded in the records kept and maintained under ORS 205.130 or in records established under any other law.

Or. Rev. Stat. § 93.630 provides:

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Moreover, § 205.130(2)(a) contemplates (as, of course, does § 86.735(1)) that promissory-note transfers *shall* be recorded. Under § 205.130(2)(a), county clerks must record any "interest" "affecting the title to real property required or permitted by law to be recorded."[9] If a promissory note is secured by a trust deed, the note affects the title to the real property identified by the deed. The note affects the title because, if the borrower defaults on the note, the result can be a foreclosure that deprives the borrower of title. Hence, any transfer of the note alters the identity of those who hold an "interest" affecting title to real property. Because a promissory-note transfer creates a new and previously

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> The county clerk shall also keep a proper direct index and a proper indirect index to the record of deeds, mortgages and all other real property interests required or permitted by law to be recorded, in which the county clerk shall enter, alphabetically, the name of every party to each instrument recorded by the county clerk, with a reference to where it is recorded.

[9] Or. Rev. Stat. § 205.130(2) provides that county clerks "shall"

> Record, or cause to be recorded, in a legible and permanent manner, and keep in the office of the county clerk, all:
>
> (a) Deeds and mortgages of real property, powers of attorney and contracts affecting the title to real property, authorized by law to be recorded, assignments thereof and of any interest therein when properly acknowledged or proved and other interests affecting the title to real property required or permitted by law to be recorded[.]

unrecorded interest affecting title to real property, § 205.130(2)(a) requires it to be recorded.[10]

Or. Rev. Stat. § 93.710(1) similarly provides that assignments "for security purposes relating to" real-property interests "may be indexed and recorded" in county records. (Emphasis added.)[11] If a trust deed identifies real property as security for a promissory note, the transfer of the promissory note constitutes an assignment of the security interest in the deed, and constitutes an assignment "for security purposes" that "relat[e] to" a real-property interest. Or. Rev. Stat. § 93.710(1) further reflects that the transfer is recordable.

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[10] Because nothing in Oregon law prohibits the recording of a promissory-note transfer, the interest described above qualifies, for § 205.130(2)(a)'s purposes, as an interest that is "permitted" by law to be recorded. And because § 86.735(1) *requires* a promissory-note transfer to be recorded prior to nonjudicial foreclosure, the interest described above also qualifies as an interest that, at least under certain circumstances, is "required" by law to be recorded.

[11] Or. Rev. Stat. § 93.710(1) provides, in part:

> *Any* instrument creating a mortgage or trust deed, or a memorandum thereof, or *assignment for security purposes relating to any of the interests or estates in real property referred to in this subsection*, which is executed by the person from whom the mortgage, trust deed, or assignment for security purposes is intended to be given, and acknowledged or proved in the manner provided for the acknowledgment or proof of other conveyances, *may be indexed and recorded* in the records of mortgages of real property in the county where such real property is located[.]

(Emphasis added.)

Text and context demonstrate that promissory-note transfers must be recorded before a nonjudicial foreclosure can commence. Nothing in the statutes cited by defendants undermines that conclusion.

2. Legislative history is consistent with the above construction.

The legislative history contains no discussion of § 86.735(1)'s recording requirements. Supporters of the bill that became § 86.735 did suggest that nonjudicial foreclosures would be speedier and more efficient than judicial foreclosures. Yet none of the testimony supporting the bill suggested that the bill would foster efficiency by reducing or eliminating any preexisting *recording* requirements. Instead, supporters generally noted that § 86.735 would increase efficiency by shrinking the amount of time for those in default to exercise their "right of redemption"—their right to terminate foreclosure proceedings by making the defaulted payments.[12]

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[12] Under the pre-1959 judicial foreclosure process, which was initiated by a lawsuit under Or. Rev. Stat. § 88.010, the "right of redemption" lasted until "a decree [memorializing the sale] is given." Or. Rev. Stat. § 88.100 (1953). In creating Oregon's nonjudicial foreclosure process, the 1959 Legislature provided that the redemption period for that process could last no longer than 175 days after notice of the default was recorded. Or. Laws 1959, ch. 625, § 10. In arguing that the 1959 bill would increase efficiency, supporters emphasized the "long period of time" that the existing judicial foreclosure process granted, to those in default, for redeeming property. *See* Testimony, House Judiciary Committee Exhibits, Senate Bill 117, 2/20/1959 letter to Senator Pearson from Vice President of Schuyler Southwell Inc. General Contractors, supporting bill and stating that "[t]he record of redemption

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The history does reflect that the 1959 Legislature, in authorizing nonjudicial foreclosures, intended—in part—to assist and protect Oregon homeowners. *See* Minutes, Committee on Financial Affairs, February 12, 1959 Hearing on S.B. 117, at p. 1 (noting that Senator Cook "explained the purpose of the bill" and "feels that SB 117 would be to the best interests of both lenders and borrowers"); *id.* (noting that Portland Realty Board representative supported bill and "feels that it would be a help to the small borrower"). The legislature also intended, in creating § 86.735(1)'s recording requirements, to help homeowners avoid the wrongful sale of their properties. *See Staffordshire Investments, Inc. v. Cal-Western Reconveyance Corporation*, 209 Or. App. 528, 542, 149 P.3d 150 (2006), *rev. den.*, 342 Or. 727 (2007) (Or. Rev. Stat. §§ 86.705-86.795 were intended, in part, "to protect grantors from the unauthorized foreclosure and wrongful sale of property"). Significantly, requiring promissory-note transfers to be recorded helps protect homeowners by

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under mortgage foreclosures do not support the contention that such a long period of time serves any good purpose"); Minutes, Committee on Financial Affairs, February 12, 1959 Hearing on S.B. 117, at pp. 1-2 (noting that Standard Insurance Company Assistant Vice President "in charge of the mortgage department" explained that his company "would be more attracted to those states operating under Trust Deed laws . . . because of it being possible for the lender to gain possession of the property quicker" and "to offer it either for sale or for rent without the handicapping feature of the redemption rights on the part of the former borrower").

enabling them to ensure that any nonjudicial foreclosure was commenced by those with authority to do so. Legislative history thus suggests that the legislature intended to require the recording of all promissory-note transfers whenever a lender seeks to foreclose outside the judicial process.

3. "Third-level" maxims support the conclusion that § 86.735(1) requires promissory-note transfers to be recorded.

"If the legislature's intent remains unclear after examining text, context, and legislative history," a court—in construing an Oregon statute—"may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Gaines*, 346 Or. at 172. Those maxims include "the maxim that, where no legislative history exists, the court will attempt to determine how the legislature would have intended the statute to be applied had it considered the issue." *PGE*, 317 Or. at 612. That maxim supports the conclusion that the legislature intended § 86.735(1) to require promissory-note transfers to be recorded prior to a nonjudicial foreclosure.

The Oregon Legislature intended that the nonjudicial foreclosure process would be equitable and efficient for homeowners, consumers, and lenders alike. *See Staffordshire Investments, Inc.*, 209 Or. App. at 542 (Or. Rev. Stat. §§ 86.705-86.795 "represents a well-coordinated statutory scheme to protect grantors from the unauthorized foreclosure and wrongful sale of property, while

at the same time providing creditors with a quick and efficient remedy against a defaulting grantor").[13]

The Oregon Legislature also intended that homeowners and purchasers of foreclosure properties should have confidence in the nonjudicial foreclosure process. *See Bamberger v. Geiser*, 24 Or. 203, 210, 33 P. 609 (1893) (describing the traditional "purpose of the registry laws" as being "to protect subsequent purchasers against prior and unrecorded conveyances").

Requiring promissory-note transfers to be recorded promotes those goals. The requirement ensures that homeowners faced with nonjudicial foreclosure, along with prospective purchasers of a foreclosed property, have easy access to records confirming that those initiating the foreclosure have the right to do so. Requiring promissory-note transfers to be recorded ensures that a homeowner facing foreclosure will not need to use the court system to access that information. Ultimately, the requirement promotes an efficient foreclosure system, one whose transparency benefits consumers and lenders alike.[14]

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[13] Under Oregon law, a "grantor" is, in essence, the borrower whose name appears on a promissory note and trust deed. *See* Or. Rev. Stat. § 86.705(4) (defining "grantor" as "the person that conveys an interest in real property by a trust deed as security for the performance of an obligation").

[14] Defendants suggest that, "[i]n some cases, lenders who formerly owned the note will have gone out of business, making it impossible to obtain and record the necessary written assignments" prior to a nonjudicial

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Defendants assert that if § 86.735(1) requires promissory-note transfers to be recorded, a "flood of unnecessary litigation" will result, and that defaulting homeowners will try to set aside already completed foreclosure sales, thereby "clouding title" for "subsequent *bona fide* purchasers." (Br. 16, 42). That assertion, however, provides no useful guidance to the statutory-construction question here, even assuming that Oregon law entitles a defaulting homeowner to challenge an already-completed foreclosure sale.

First, it may be a relatively unusual case in which a homeowner who defaulted, and whose home was already sold via a nonjudicial foreclosure, will attempt to challenge the foreclosure after the fact. Under Oregon law, the completed sale reflects that the homeowner violated the note's repayment terms, and then was unable to "cure the default" prior to the sale. *See* Or. Rev.

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foreclosure. (Br. 41). But nothing in § 86.735(1) suggests that the required recordings necessarily have to involve the entity that made or received the assignment in question. Nothing would preclude a party who wishes to commence a nonjudicial foreclosure from recording a promissory-note transfer that it was not directly involved in; that party could record the transfer by submitting a document that memorialized the transfer in some fashion.

Notably, defendants describe MERS as an "electronic database that tracks transfers of promissory notes." (Br. 9). In cases in which MERS was the nominee for a lender and its successors, it presumably will not be difficult for the current note holder to obtain documentation of, and to record, any promissory-note transfer that was not recorded previously.

Stat. §§ 86.735(2) (authorizing nonjudicial foreclosure only if homeowner defaulted); § 86.753(3) (permitting homeowner to make required payments "at any time prior to five days before" sale). As a result, the only homeowners who will perceive a practical benefit to trying to "undo" the sale, based on § 86.735(1), will be those whose financial circumstances have changed dramatically in the meantime. That factor suggests that any litigation "flood" will be significantly smaller than defendants suggest.

Second, even if the state's proposed construction *would* produce the consequences imagined by defendants, defendants—and any other entities with histories of similar practices—have only themselves to blame. By commencing a nonjudicial foreclosure without ensuring that all promissory-note transfers had been recorded, defendants undeniably took a risk. Nothing in § 86.735(1) expressly exempts promissory-note transfers from the provision's recording requirements, and neither this court nor any Oregon appellate court (that is, no court whose construction of the statute would have been binding in this case) has construed the provision as creating such an exemption. Defendants nonetheless proceeded with a nonjudicial foreclosure in the hope that any failures to record promissory-note transfers would be insignificant. If that gamble turns out to have been ill-advised, and to have "clouded title" with

respect to foreclosed properties, the blame lies with defendants, and should not be invoked as a reason for construing § 86.735(1) as they urge.

Third-level maxims support the conclusion that § 86.735(1) requires promissory-note transfers to be recorded prior to a nonjudicial foreclosure.

B. By itself, calling MERS a "beneficiary" in a trust deed does not automatically make MERS a beneficiary under Oregon law.

As in other nonjudicial foreclosure cases involving MERS, the trust deed referred to MERS as "the beneficiary under this Security Instrument." (E.R. 24). According to defendants, the trust deed's beneficiary thus was MERS both before and after each promissory-note transfer. Hence, defendants argue, § 86.735(1)—which requires the recording of all trust deed assignments by a beneficiary—did not require the promissory-note transfers to be recorded. (*See* App. Br. 39, arguing that district court ruling would require MERS to "record an assignment of the trust deed to itself each time the [promissory] note was transferred"). Defendants are mistaken.

An entity qualifies as a "beneficiary" under Oregon law only if it is "named or otherwise designated in a trust deed *as the person for whose benefit a trust deed is given.*" Or. Rev. Stat. § 86.705(2) (emphasis added).[15] Although

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[15] Defendants emphasize the phrase "named or otherwise designated" to suggest that an entity "named" as a beneficiary in a deed necessarily *is* a

Footnote continued...

the trust deed refers to MERS as the "beneficiary," courts need not accept that assertion at face value. The deed would have rendered MERS as its "beneficiary" only if the deed—read as a *whole*—described MERS's rights in a manner that satisfied Oregon's legal definition of that term. *See Ocean Accident & Guarantee Corp. v. Albina Marine Iron Works*, 122 Or. 615, 617, 260 P. 229 (1927) ("law of the land applicable thereto is a part of every valid contract").[16] The deed failed to do so.

Read as a whole, the deed demonstrates that, under Oregon law, GN Mortgage—and not MERS—was the deed's initial "beneficiary." The deed "secures to [the] Lender," GN Mortgage, "the repayment of the Loan." (E.R. 23, 25).[17] In other words, the deed was created for GN Mortgage's benefit, to

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(...continued)
beneficiary under Oregon law. (Br. 26). Defendants essentially ignore the remainder of the statutory definition.

[16] The Oregon Legislature could have provided that § 86.705(2)'s definition of "beneficiary" controls "unless the parties agree otherwise," but—although it has adopted similar wording in other statutes—it has not done so in chapter 86. *See* Or. Rev. Stat. § 90.340 ("[u]nless otherwise agreed, [a] tenant shall occupy [a] dwelling unit only as a dwelling unit"). That omission is significant. *Cf. State v. Rainoldi*, 351 Or. 486, 492, 268 P.3d 568 (2011) ("given that the legislature knows how to include a culpable mental state requirement," it can be inferred that "the omission of such a requirement [in the statute at issue] was purposeful").

[17] Even aside from §§ 86.705 and 86.735, Oregon statutes contemplate that when a trust deed secures a loan, the lender is the beneficiary. *See* § 86.737(4)(a) and (b) (identifying situations in which "the beneficiary" of

Footnote continued...

permit it to foreclose on the property if the borrower defaulted on the loan that the deed secured. Because the deed was created for the lender's benefit, the lender qualified as the deed's initial "beneficiary." *See* Or. Rev. Stat. § 86.705(2) (trust deed's "beneficiary" is "the person for whose benefit a trust deed is given"). It follows that the lender's successors (a category that does not include MERS) also qualified as the deed's beneficiaries.

The promissory note further supports the conclusion that the trust deed was created for GN Mortgage's benefit, and that GN Mortgage and its successors—rather than MERS—were the deed's beneficiaries. The note declares that GN Mortgage is the entity entitled to payments, and that its right to payment is secured by the security instrument that the borrower signed. (*See* E.R. 43, identifying the lender as GN Mortgage, declaring that "Lender may transfer this Note," and referring to "Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note" as the "Note Holder"; E.R. 45, noting that a "Security Deed (the 'Security Instrument'), dated the same date as this Note, protects the Note Holder from possible losses that might result if [the borrower does] not keep the [note's] promises").

(...continued)
a residential trust deed "[m]ade the loan with the beneficiary's own money" or "[m]ade the loan for the beneficiary's own investment"); § 86.205(4) (as used in §§ 86.205 to 86.275, "lender" includes "beneficiaries under trust deeds").

Nothing in the note suggested that the deed was designed to benefit anyone other than the lender and its successors.

Because the deed was not created to benefit MERS, MERS was never the beneficiary under § 86.705(2). MERS was merely the "nominee" for the true beneficiaries. (*See* E.R. 25: "[t]he beneficiary of this Security Instrument is MERS (*solely as nominee for Lender and Lender's successors and assigns*)"; emphasis added). In other words, although the deed reflects that MERS—as the true beneficiaries' nominee—possessed authority to do things for their benefit, nothing suggests that the trust deed was designed for *MERS's* benefit, or that MERS thereby qualified as the beneficiary under Oregon law. *See Landmark National Bank v. Kesler*, 289 Kan. 528, 538, 216 P.3d 158 (2009) (noting that *Black's Law Dictionary* 1076 (8th ed. 2004) defines nominee as a "person designated to act in place of another, usu. in a very limited way," and as a "party who holds bare legal title *for the benefit of others* or who receives and distributes funds *for the benefit of others*"; emphasis added).

Defendants invoke the following sentence from the trust deed to suggest that the deed gave MERS the "right to receive payment of the obligation," and therefore made MERS the beneficiary under Oregon law:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, *if necessary to comply with law or custom, MERS* (as nominee for Lender and Lender's successors and assigns) *has the right*: to

> exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and *to take any action required of Lender* including, but not limited to, releasing and canceling this Security Instrument.

(E.R. 25 (emphasis added); *see* Br. 34, arguing that "the trust deed repeatedly calls MERS the beneficiary, a statement which would not comply with law or custom unless MERS's powers were expanded to include the right to receive payment of the obligation"). But even if that clause somehow gave MERS (as the note holder's agent) the ability to *receive* payments from the borrower under certain circumstances, it does not suggest that the payments ultimately would be for MERS's *benefit.*[18]

Instead, the trust deed as a whole (including the passage quoted above) demonstrates that payments on the note were for the benefit of the initial lender or its successors, and that MERS was the mere "nominee for Lender and Lender's successors and assigns." (E.R. 25). GN Mortgage (and its successors) were the entities entitled to "repayment of the Loan," and the deed was created

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[18] Defendants' own documents suggest that the promissory-note assignments were intended to benefit the initial lender and its successors, and not MERS. Those documents describe a "Transfer [of] Beneficial Rights" from Guaranty Bank to Wells Fargo on December 9, 2005, along with a "Transfer [of] Beneficial Rights" from Wells Fargo to Bank of America on July 15, 2006. (E.R. 92). If MERS was the entity that was meant to benefit from the payment obligation secured by the deed, those transfers presumably would have reflected that MERS—and not the financial institutions listed above—possessed the "Beneficial Rights" at issue.

to "*secure[] to Lender* . . . the repayment of the Loan" and "the performance of Borrower's covenants and agreements under this Security Instrument and the Note." (*Id.*). Because the deed shows that payments were for the lender's (and its successors') benefit—and not for MERS's benefit—MERS was not the deed's beneficiary for purposes of Oregon law.[19]

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[19] Defendants assert that, even if the promissory note did not entitle MERS to payments, MERS could still be the deed's beneficiary. (Br. 28). According to defendants, Or. Rev. Stat. § 86.720 recognizes that an entity can be the "beneficiary of record" even if it is not the entity that receives "the full satisfaction payment":

> [p]rior to the issuance and recording of a release pursuant to this section, the title insurance company or insurance producer shall give notice of the intention to record a release of trust deed to the beneficiary of record and, if different, the party to whom the full satisfaction payment was made.

Or. Rev. Stat. § 86.720(3). Yet nothing in § 86.720(3) suggests that, if a trust deed secures the payments owed to a lender, the trust deed "beneficiary" is someone other than the entity to whom payments are owed.

Rather, that provision contemplates two possibilities: (1) that *if* all assignments have not already been recorded, the current beneficiary (the one receiving the final payment satisfying a loan) may differ from the "beneficiary of record"; and (2) that the final payment satisfying the loan, rather than being made to the beneficiary of record, may have been made to a loan servicer or to some other *agent* of the beneficiary of record. Under either scenario, the lender (or its successor) is still the entity to whom payments ultimately are owed, and is the entity for whose *benefit* the trust deed was created. Under either scenario, the lender remains the rightful "beneficiary" under Oregon law.

Finally, defendants claim that *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034 (9th Cir. 2011), rejected the proposition "that MERS is not a valid beneficiary because it does not own the note," and they claim that *Cervantes* is "dispositive." (Br. 19-20). Here, too, defendants are mistaken. Although *Cervantes* rejected a claim that "no party is in a position to foreclose" when interests have been transferred via the "MERS system," the court did not resolve whether MERS may be deemed a trust deed's "beneficiary." 656 F.3d at 1044. The *Cervantes* court simply noted that, "[*e*]*ven if we were to accept* [the plaintiffs' assertion] that . . . MERS is a sham beneficiary," it would reject the plaintiffs' argument that "no party ha[d] the power to foreclose." 656 F.3d at 1044.

Further, although *Cervantes* involved Arizona law, the plaintiffs did not "allege a violation of [Arizona] state recording and foreclosure statutes." 656 F.3d at 1044. *Cervantes*' ultimate holding, it follows, was based neither on Or. Rev. Stat. § 86.735(1) nor on any Arizona statute that mirrors § 86.735(1). *Cervantes* does not govern the statutory-construction question at issue.

The promissory-note transfers in this case shifted the beneficial interest in the trust deed from one financial institution to another—that is, from one beneficiary to a new beneficiary. MERS was not the deed's "beneficiary" for purposes of Oregon law.

CONCLUSION

Oregon's statutory construction methodology reveals that Or. Rev. Stat. § 86.735(1) requires promissory-note transfers to be recorded prior to a nonjudicial foreclosure. The methodology further reveals that MERS was not the "beneficiary" of the trust deed at issue. Because not all promissory-note transfers were recorded in this case, § 86.735(1) precluded a nonjudicial foreclosure. Construing § 86.735(1) in that manner comports with the Oregon Legislature's intent to create an equitable, transparent, and efficient nonjudicial foreclosure system.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7), Federal Rules of Appellate Procedure, I certify that the State of Oregon's Amicus Brief is proportionately spaced, has a typeface of 14 points or more and contains 6,928 words.

DATED: March 27, 2012

/s/ Rolf C. Moan
ROLF C. MOAN
Assistant Attorney General
rolf.moan@doj.state.or.us

Attorney for Amicus Curiae
State of Oregon

RCM:blt/3297925

Exhibit 42

Exhibit A

IN THE SUPREME COURT OF THE STATE OF OREGON

BART G. BRANDRUP and JESSICA D. BRANDRUP, husband and wife,
Plaintiffs,

v.

RECONTRUST COMPANY, N.A.; BANK OF AMERICA, N.A., successor by merger with BAC Home Loans Servicing, LP; THE BANK OF NEW YORK MELLON, fka The Bank of New York, as Trustee for The Certificate Holders Cwalt, Inc., Alternative Loan Trust 2006-2CB, Mortgage Pass-through Certificates; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,INC.,
Defendants.

United States District Court
311CV1390JE

RUSSELL R. POWELL and DIANE L. POWELL, husband and wife,
Plaintiffs,

v.

RECONTRUST COMPANY, N.A.; BANK OF AMERICA, N.A., successor by merger with BAC Home Loans Servicing, LP; THE BANK OF NEW YORK MELLON, fka The Bank of New York, as Trustee for The Certificate Holders Cwalt, Inc., Alternative Loan Trust 2007-OH3, Mortgage Pass-through Certificates, series 2007-OH3; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,INC.,
Defendants.

United States District Court
311CV1399HZ

DEANIRA MAYO AND REYNALDA PAEZ PLANCARTE,
Plaintiffs,

v.

RECONTRUST COMPANY, N.A.; BANK OF AMERICA, N.A., successor by merger with Bac Home Loans Servicing, LP; DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for the Certificate Holders of the Morgan Stanley ABS Capital I, Inc., Trust 2005-HE2, Mortgage Pass-through Certificates, Series 2005-HE2; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,INC.,
Defendants.

ORDER ACCEPTING CERTIFIED QUESTION

United States District Court
311CV1533PK

OMID MIRARABSHAHI,
Plaintiff,

v.

RECONTRUST COMPANY, N.A.; BANK OF AMERICA, N.A., successor by merger with Bac Home Loans Servicing, LP; THE BANK OF NEW YORK MELLON, fka The Bank of New York, as Trustee for The Certificate Holders of CWMBS, INC., CHL Mortgage Pass-Through Trust 2007-4, Mortgage Pass-through Certificates, Series 2007-4; and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,INC.,
Defendants.

S060281

ORDER ACCEPTING CERTIFIED QUESTION

Upon consideration by the court.

On April 13, 2012, the United States District Court filed an Order Certifying Questions to the Supreme Court of Oregon in the following actions: *Brandrup v. Recontrust Company, NA,* 311CV1390; *Powell v. Recontrust Company, NA,* 311CV1399HZ; *Mayo v. Recontrust Company, NA, 311CV1533PK; and Mirararbshahi v. Recontrust Company, NA, 312CV0010HA.* The certified questions are:

1. May an entity such as MERS, that is neither a lender nor successor to a lender, be a "beneficiary" as that term is used in the Oregon Trust Deed Act?

2. May MERS be designated as beneficiary under the Oregon Trust Deed Act where the trust deed provides the MERS "holds only the legal title to the interests granted by Borrower in the Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests?

3. Does the transfer of a promissory note from the lender to a successor result in an automatic assignment of the securing trust deed that must be recorded prior to the commencement of nonjudicial foreclosure proceedings under ORS 86.735(1)?

4. Does the Oregon Trust Deed Act allow MERS to retain and transfer legal title to a trust deed as nominee for the lender, after the note secured by the trust deed is transferred from the lender to a successor or series or successors?

ORS 28.200 authorizes this court, in its discretion, to answer questions of law certified to it by a United States District Court. The court accepts the certified questions and will answer the certified questions in due course.

Thos. A Balmer 7/19/2012 2:01:32 PM

THOMAS A. BALMER
CHIEF JUSTICE, SUPREME COURT

c: John P Bowles
Richard M Fernandez
Timothy J Zimmerman
P Andrew McStay, Jr
Pilar French
Julie M Engbloom
Hon. Ann Aiken

No. 11-35534

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IVAN HOOKER and KATHERINE HOOKER,
Plaintiffs-Appellees,

v.

NORTHWEST TRUSTEE SERVICES, INC.,
Defendant, and

BANK OF AMERICA, N.A. and MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
Defendants-Appellants.

On Appeal from the United States District Court
For the District of Oregon

NOTICE BY APPELLEES OF RULING BY THE OREGON SUPREME COURT ACCEPTING QUESTIONS CERTIFIED BY THE U.S. DISTRICT COURT

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CENTER FOR RESPONSIBLE LENDING

July 26, 2012

Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
95 7th Street
San Francisco, California 94103

Re: *Hooker v. Northwest Trustee Services, Inc.*, No. 11-35534

To the Clerk of the Court:

Pursuant to the Court's order dated May 29, 2012, Appellees Ivan and Katherine Hooker write to notify the Court that on July 19, 2012, the Oregon Supreme Court accepted the questions certified by the Oregon district court on April 2, 2012. (*See* Ex. A, attached). Appellees continue to urge this Court to both certify the questions presented in Appellees' Motion for Certification of May 7, 2012, and request that the Oregon Supreme Court consider the certified questions on a consolidated basis with the questions certified by the Oregon district court.

Respectfully submitted,

/s/ Nina F. Simon
Nina F. Simon, DC No. 256396
CENTER FOR RESPONSIBLE LENDING

Hope A. Del Carlo, OSB No. 002410

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1330 Broadway, Suite 604, Oakland CA 94612 • Phone 510.379.5000 • Fax 510.893.9300
www.responsiblelending.org

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing letter dated July 26, 2012, with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 26, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I certify that one of the participants in the case is not a registered CM/ECF user and that I have mailed the foregoing by First-Class Mail, postage prepaid, to the following non-CM/ECF participant:

John M. Thomas
Routh Crabtree Olson, PC
621 SW Alder St., Suite 800
Portland, OR 97205
Attorney for Northwest Trustee Services, Inc.

Dated: July 26, 2012

/s Nina F. Simon

JOHN L. RUNFT (ISB # 1059)
JON M. STEELE (ISB # 1911)
RUNFT & STEELE LAW OFFICES
1020 W. Main Street, Suite 400
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Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual, Plaintiff, vs. HOMECOMINGS FINANCIAL, LLC, a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware Limited Liability Company; DOES I-V, and ABC CORPORATIONS I-V, Defendants.	CASE NO. CV OC 1023898 **SECOND AFFIDAVIT OF STEELE IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION**

STATE OF IDAHO)
:ss
County of Ada)

COMES NOW, Jon M. Steele, being over the age of eighteen years and competent to make this Affidavit, after first being duly sworn, and upon his own personal knowledge, states as follows:

6

1. I am an attorney in good standing with the Idaho State Bar and counsel for Plaintiff herein.
2. I make this Affidavit in support of Plaintiff's Motion for Reconsideration.
3. Attached as Exhibit 43 is a true and correct copy of the deposition of Ritchie Eppink taken on June 20, 2012.

Further, your affiant sayeth naught.

DATED this 30th day of August 2012.

RUNFT & STEELE LAW OFFICE, PLLC

By: _____
JON M. STEELE
Attorney for Plaintiff

STATE OF IDAHO)
:ss
County of Ada)

SUBSCRIBED AND SWORN unto me this 30th day of August 2012.

_____
Notary Public for the State of Idaho
Residing at: Boise, Idaho
My Commission Expires: 07.19.2017

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of August 2012, a true and correct copy of the foregoing **SECOND AFFIDAVIT OF JON M. STEELE IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION** was served upon opposing counsel as follows:

Michael G. Halligan
Sussman Shank LLP
1000 SW Broadway, Suite 1400
Portland, OR 97205-3089
Counsel for MERS

X US Mail
____ Personal Delivery
____ Facsimile

Peter J. Salmon
William L. Partridge
Pite Duncan, LLP
950 W. Bannock St., Suite 1100
Boise, ID 83702
Counsel for Homecomings and Executive Trustee

X US Mail
____ Personal Delivery
____ Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

THOMAS J. WIGGS NOTARY PUBLIC STATE OF IDAHO

By: _____
JON M. STEELE
Attorney for Plaintiff

Exhibit 43

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual, Plaintiff, vs. HOMECOMINGS FINANCIAL, LLC, a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware Limited Liability Company; DOES I-V, and ABC CORPORATIONS I-V, Defendants.	Case No. CV OC 1023898

DEPOSITION OF RICHARD A. EPPINK

Moffatt, Thomas, Barrett, Rock & Fields, Chartered
101 South Capitol Boulevard, Tenth Floor
Boise, Idaho

Wednesday, June 20, 2012
Beginning at 9:00 o'clock a.m.

QnA COURT REPORTING, LLC
Lori A. Pulsifer, CSR, CCR, RDR, CRR
Certified in Idaho, Washington, and Utah
E-mail: realtimeQnA@msn.com
Telephone: 208.484.6309

(ELECTRONIC COPY)

APPEARANCES

FOR THE PLAINTIFF:
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FOR THE DEFENDANT MERS:
Mr. Matthew J. McGee
Attorney at Law
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THE DEPOSITION OF RICHARD A. EPPINK was taken on behalf of the Defendant Mortgage Electronic Registration Systems, Inc., the 20th day of June 2012, at Moffatt, Thomas, Barrett, Rock & Fields, 101 South Capitol Boulevard, Tenth Floor, Boise, Idaho, before Lori A. Pulsifer, Court Reporter and Notary Public within and for the State of Idaho, to be used in an action pending before the Fourth Judicial District of the State of Idaho, in and for the County of Ada, said cause being Case No. CV OC 1023898.

The following proceedings were held, to wit:

* * *

RICHARD A. EPPINK,
having been first duly sworn, testified as follows:

EXAMINATION

BY MR. McGEE:

Q. Mr. Eppink -- is that how you say it? --

A. It is.

Q. -- my name is Matt McGee. I am one of the attorneys for the Defendant Mortgage Electronic Registrations Systems, Inc.

Have you ever been deposed before?

A. No.

Q. You are an attorney; right?

A. I am.
Q. Have you taken depositions?
A. I have been involved in taking depositions.
Q. You, generally, know the process?
A. I believe I am familiar with it.
Q. I just wanted to make sure.
I am sorry. You said you have not been deposed before?
A. I have not been deposed.
(Deposition Exhibit No. 1 was marked.)
BY MR. McGEE:
Q. Mr. Eppink, you have been handed the Notice of Deposition Duces Tecum setting the deposition of yourself for today at 9:00 a.m.
Have you reviewed this document?
A. I have reviewed, I believe, this same document. It looks like it. I have reviewed it.
Q. Did you bring any documents with you to the deposition today?
A. I brought them on a DVD.
Q. A DVD. Is this a lot of information?
A. It depends what you mean by "a lot."
Q. Are we talking about hundreds of pages?
A. Hundreds of pages, probably, yes.
Q. And is this information that you compiled in

preparation for the deposition?
A. Yes.
Q. Did you review all of it?
A. All that is on the DVD?
Q. Yes.
A. Did I review it in preparation for the deposition?
Q. Yes.
A. Probably not, no.
Q. This is just part of kind of a library of documents that you keep on these types of matters?
A. I got this notice on Monday, and I did my diligent best to provide you with the documents described in there.
As for a couple of these items, I don't think that it would have been feasible for me to provide, for example, "All literature or other authoritative material..."
Item 6 in the document description, for instance, says, "All literature or other authoritative material you have reviewed concerning issues in this action." I mean, would encompass case law and other articles that I haven't cataloged or written down.
So I won't be able to -- I don't even think it would be possible for me to give you everything that is

the basis of my knowledge that has to do with this particular case.
Q. Okay.
A. But there are documents on there that -- that DVD consists of documents that are in my electronic file concerning this case. It may be that some of those -- for instance, some of the literature and authoritative material I have reviewed; but I have not reviewed all of it.
There are, also, documents that are pleadings and other papers that Mr. Steele has provided to me concerning this case.
Q. So would you describe the documents on this DVD as the pleadings related to this case and a selection of the documents and literature you have reviewed on matters pertinent to this case?
A. I think that would be a partial description.
Q. What else would that encompass? What else is on this DVD?
A. I believe you also requested a C.V. There is a C.V. on there that I believe is up to date. I reviewed it, I believe, yesterday or the day before. There are time records concerning this case. There may be a few other documents that are described in the Notice.
Q. And what do you mean by "time records"?

A. I believe you requested records of my time with respect to this case.
Q. So the time you have spent reviewing materials in preparation for this deposition and in preparation to be a trial witness?
A. Yes. As a matter of fact, there is one document that is not on the DVD because I printed it out this morning. That is time records for the last two days; and I will provide that to you, as well.
Q. Why don't we start by just going through your education. Will you describe for me kind of your educational background, just real briefly?
A. After high school?
Q. Well, why don't we start with high school? Are you from the area?
A. No. I went to high school at Western Albemarle High School in Crozet, Virginia.
Q. What year did you graduate?
A. 1995.
Q. Then what did you do?
A. Then I enrolled in college in Boston, Massachusetts.
Q. What college?
A. Boston University.
Q. What did you get your degree in?

A. Well, after one year at Boston University, I transferred back to my hometown; and I went to the University of Virginia where I completed a degree in 1999.
Q. What was that degree in?
A. Computer science.
Q. And then what?
A. As far as my education, several years later, I enrolled in Law School at the University of Idaho.
Q. Several years later? When did you enroll at the University of Idaho?
A. 2003.
Q. So when did you graduate?
A. 2006.
Q. Have you been practicing law in Idaho since then?
A. Immediately following law school, I was admitted -- well, not immediately following. I was admitted to the Bar the September following law school. At that time, I was living in Edmonton, Alberta, under a fellowship. I began actively practicing law the following June of 2007.
Q. You began practicing law in Idaho in June of 2007?
A. Yes, actively practicing in Idaho.

Q. What was the nature of your fellowship?
A. It was a Fulbright Fellowship, which is a research exchange program that is established through intergovernmental agreements in the United States and other countries.
So I was housed and based at the Faculty of Law at the University of Alberta to research public legal education efforts throughout the country of Canada.
Q. Can you elaborate on the nature of your research? It sounds like it was for a period of about a year; correct?
A. It was the period of an academic year. It would have been about August to May or June, as I recall.
Q. Okay.
A. The research concerns organizations that don't exist in the same form in the United States as they do in Canada. They would be organizations that, rather than provide episodic legal advice and representation, provide what they sometimes call preventive law or public legal education.
It is lawyers and other professionals engaged in the practice of educating the public about rights and responsibilities, legal duties, and other things like that.

Q. It sounds interesting. Did you like it?
A. Well, yes. It was great. I had good mentors. I had great access, by virtue of the Fulbright Fellowship, to almost anything I wanted to go to and travel to.
Q. Great.
So after your fellowship, you began actively practicing law in Idaho; right?
A. That's right.
Q. Where were you practicing law?
A. Idaho Legal Aid Services.
Q. Is that where you are still practicing law?
A. No.
Q. Where do you practice law now?
A. At the American Civil Liberties Union of Idaho Foundation.
Q. Tell me about your time at Idaho Legal Aid. To be more specific, I suppose, what were your responsibilities and who were your clients, et cetera?
A. I had two positions at different times at Idaho Legal Aid Services. One was called Staff Attorney, and that was from 2007 until 2010. In that position, primarily, I focused on housing law, generally speaking, and representation of victims of sexual assault and domestic violence.

So my clients would have been -- in the case of housing law, they would have been tenants or homeowners, primarily.
In the case of the domestic violence and sexual assault work, they would have been adults and children who were the victims of crimes or alleged crimes. That was through 2010.
In the spring of 2010, I took another position at Idaho Legal Aid called Justice Architect, which was a complement to another position there, which is the Litigation Director.
In the Justice Architect role, I continued to focus on housing law. I did less, although I still did some, work with domestic violence and sexual assault victims.
Also, that position was responsible for coordinating a multi-faceted advocacy strategy for the State of Idaho, with respect to people and families with low incomes and limited assets -- generally, the under-represented.
Q. Going back to your Staff Attorney position -- you mentioned housing law -- what did your work entail there?
A. It entailed a number of different things. Among them would have been representing both tenants and

homeowners faced with homelessness or the loss of their shelter.

It could be through eviction. It could be through foreclosure. It could be through other practices of housing providers that threatened their enjoyment or their ability to have their home. It also involved work with housing discrimination, as well.

Q. When you say "housing discrimination," what does that mean? Is there statutory framework?

A. Primarily, the Federal Fair Housing Act but, also, the Idaho Human Rights Act and other laws.

Q. You mentioned that you represented homeowners facing foreclosure. Can you be more specific with respect to the nature of your role in those types of cases?

A. Well, it would vary. There would be many different roles. For a period of time -- and I can't recall the period of time, but it probably would have ended around 2010 or maybe later -- I ran a weekly eviction clinic. That is the way it was described.

Every Monday, most of the time, there would be somewhere between, I suppose, at the low end, one person but, generally, my recollection is that it would have been between three and a dozen people or families -- it could be homeowners or it could be tenants -- who were

concerned about being evicted or ejected from their homes or had some other landlord-tenant or housing law issue.

So during the period of that eviction clinic, I would have provided a range of services ranging from very, very brief counsel and advice to full representation in litigation or administrative proceedings related to those housing issues.

In addition to that, I did a number of other clinics. There were other entry points to my services and the services of Legal Aid that were beyond the eviction clinic, as well as training for volunteer lawyers through the Idaho Volunteer Lawyers Program and training for other attorneys to conduct those kind of cases or, at least, to evaluate them.

Q. You mentioned that sometimes this clinic led to full representation in litigation or administrative proceedings. In about how many instances did you represent your clients or folks that attended your clinic in litigation or administrative proceedings?

A. For most of the time that I was at Legal Aid, up until about the last couple of years -- it may be less than that -- my caseload there would have been anywhere between sixty and one-hundred-twenty cases most of the time.

So it would be very difficult for me to even give you a guess, over the course of time, of how many full representation cases I closed. I didn't come prepared to answer that.

Q. Fair enough.

A. Maybe that gives you an idea.

Q. Maybe we can narrow it down.

Are you familiar with the facts and circumstances underlying this particular litigation you are here to talk about today?

A. I think so.

Q. In about how many of those types of cases were you involved in representing, I assume, homeowners?

I guess I should be very specific. I am not talking about landlord-tenant law, and I am not talking about discrimination matters. I am talking specifically about what we can term "wrongful-foreclosure-type cases," maybe.

A. Of those cases, full representation with an appearance in a state or a federal court, I would say, a half dozen.

Q. And that is total?

A. Total.

Q. Do you recall what those cases were? Can you recall the names of those cases?

A. I can recall some of them.

Q. What are they?

A. There is a case called Rudan v. MetLife, roughly. There is a case that is still ongoing called Bank of New York Mellon -- roughly -- v. Green.

There is a case called Rachunok, and I don't recall the bank involved in that case. There is another case, and I didn't appear in this case but did provide assistance in a case called Ralph v. MetLife. That was handled by another lead attorney at Legal Aid.

There is a case with a woman named Beatrice -- I think her name is Beatrice -- that is her first name, but I can't recall her last name.

Those are the ones that I can recall right now.

Q. Is the Rudan v. MetLife case a state court matter?

A. That was initially a state court matter. It was removed to federal court, District of Idaho.

Q. Was that revolved?

A. That was resolved.

Q. How was it resolved?

A. By confidential settlement.

Q. What about Bank of New York Mellon v. Green?

A. That is still pending, but I believe it will be resolved.

Q. And where was that filed?
A. State court.
Q. Do you know what district?
A. Fourth Judicial District, Ada County.
Q. What about Rachunok?
A. Rachunok was also an Ada County case.
Q. State court?
A. State court. Actually, there may be -- I am now recalling some others.
Q. We will get to those in a second.
How was the Rachunok --
A. Rachunok was resolved.
Q. It was resolved, also, by settlement?
A. Yes, by settlement.
Q. And Ralph v. MetLife?
A. It is my understanding that that case was recently dismissed by settlement. That case was resolved, I believe, after I left Legal Aid. I think it was in the last month or so.
Q. And you are familiar with the decision on a motion to dismiss in that case; correct?
A. From Minidoka County?
Q. Yes.
A. Yes.
Q. Now, what about this Beatrice case? I realize

you can't remember the last name.
A. The Beatrice case was also resolved by settlement.
Q. You mentioned you recall a couple of other ones?
A. Yes. There are a couple of others that I have assisted in. I can't remember if I appeared in them or not. I don't think I will be able to give you names. If I recall them, I will. One was a Boise County case, and I have no recollection of the name at this time.
Q. Was it also resolved by settlement?
A. I believe so. I don't -- I believe so. The client in that case may have died.
Q. Any other cases that you can recall?
A. Not right now.
Q. So you mentioned that sometimes you were actually the attorney appearing and other times you assisted. What did you do when you assisted? What was your role when you assisted in those litigations?
A. It may be a role that you are familiar with, from working in a firm.
Q. Briefing?
A. It could be. I don't think, in the cases that I mentioned to you, that I provided briefing beyond comment and review.

I think it would be fair to say that I was the principal trainer and advisor, if you will, on foreclosure matters since about 2009 or so at Idaho Legal Aid.
Q. You say you were the principal trainer. You provided training to other attorneys at Legal Aid?
A. That's right.
Q. How many attorneys are there at Legal Aid?
A. Approximately twenty to twenty-five, although not all of those are full time.
Q. Tell me a little bit about the practice at Legal Aid. Are the attorneys kind of generalists, in the sense they work on foreclosure matters? I think you mentioned sexual abuse and those types of crimes. What other categories of aid does Legal Aid provide?
A. Well, it could be anything. However, there are priorities at Legal Aid; and those priorities can be, roughly, generally described as housing, domestic violence and sexual assault, and public benefits, public entitlements.
Q. And what is public benefits, public entitlements? Tell me a little bit more about that.
A. Medicaid, Temporary Assistance for Needy Families, State Welfare Programs -- that's not an exhaustive list.

Q. Is there any overlap? I mean, I assume there is some overlap in all of this stuff; but is there any overlap between the housing responsibilities at Legal Aid and the public benefits, public entitlements?
A. There can be.
Q. Can you describe that?
A. The overlap?
Q. Yes.
A. Well, sometimes people are getting it from all ends, I guess.
Q. Do you mean to say that people may be having problems with their housing and, also, be in a dispute over Medicaid or some other type of state or federal benefit?
A. Yes. I mean, they are, you know, unfortunately, symbiotic. If I have $600 or $700 a month to live on, by virtue of the fact that I worked to the point I couldn't work anymore, and I am getting SSDI and there is a reduction in my SSDI, all of the sudden I may have a real problem with my housing payment.
By the same token, if my spouse beats the crap out of me and throws me out on the street, all of the sudden I might need some public assistance. I may need a house.
Q. I noticed, when reviewing an article

Mr. Renshaw's counsel provided in discovery -- it was an article or some kind of a paper that you wrote about HAMP loan modifications and other federal legislation that was meant to address the mortgage crisis.

I guess that was kind of what I was getting at when I asked about public benefits and housing and the overlap between the two. Are those in the same category, in your mind; or are they separate issues?

A. HAMP and public benefits?

Q. Yes.

A. I suppose they could be. I mean, I think HAMP would, generally, be if you are -- if we are talking about what -- I don't want to give you the impression that they are departments at Legal Aid, you know; but we kind of describe them as departments. HAMP would not be in the public benefits department.

Q. Is it your opinion that the HAMP legislation constituted an entitlement or a public benefit at all?

A. I hadn't thought about that. I don't know.

Q. Do you intend to offer an expert opinion regarding HAMP or other federal legislation related to loan modification in this particular case?

A. I don't think I have been asked to. At this time, I don't intend to.

Q. Do you know the plaintiff, Mr. Renshaw,

personally?

A. No.

Q. How did you become involved in this litigation?

A. As an expert witness?

Q. Well, let's start with that. How did you become involved as an expert witness?

A. Mr. Steele contacted me by phone and asked if I would consider having an opinion, an expert opinion, about this case.

Q. When did he contact you about that?

A. I don't remember. It would have been within the last three months, I think.

Q. Would his contact be reflected on this DVD or in your time sheets or anything?

A. Not his initial contact about serving as an expert witness in this case.

Q. So he contacted you by telephone?

A. Yes.

Q. Would your work as an expert have begun soon after his contact?

A. Yes, it would have.

Q. Would we be able to get a good idea about when he contacted you to act as an expert witness in this case by reviewing your time sheets?

A. Probably.

Q. You kind of made the distinction between becoming involved in this litigation as an expert witness and some other role.

Are you involved in some other capacity in this litigation, or were you involved in some other capacity in this litigation?

A. During the time I was at Legal Aid -- and still now, it seems -- I think it would be fair to say that I would often get phone calls from attorneys throughout the state of Idaho who were representing homeowners in foreclosure-related matters. Mr. Steele was one of those attorneys.

Q. So he contacted you with questions about this particular case?

A. Yes.

Q. Do you recall the context of that conversation?

A. The context of it? Yes, I recall the context of it.

Q. Can you describe that?

A. It was either a call from Mr. Steele or it was a call from another attorney that he knows that knows me, asking whether I would be willing to hear something about this case and give some ideas about it.

Q. And your response was?

A. "Sure." I mean, I don't know if that's exactly

what I said.

Q. So a question or an issue was presented to you after that; correct?

A. Yes.

Q. What was that question or issue?

A. I don't know that -- well, you know, I don't recall any longer if there were specific issues that I was asked about.

I mean, generally, I think that some of the underlying facts of the case were described to me. I can't recall if there had already been pleadings prepared or filed. I think, at some point, I did review, like, an initial pleading.

Q. The Complaint?

A. Yes, I believe so.

Q. So this must have been fairly early in the process. Do you have any recollection as to when you were first contacted about this litigation?

A. Well, kind of like with the -- I don't recall, off the top of my head. There are e-mails that are on that DVD. There are e-mails either from Mr. Steele or from myself to Mr. Steele, and they may give you some idea of when that was.

I mean, it is the same as with my caseload at Legal Aid. I have received enough of these calls that

it is difficult for me to remember all of them.
Q. Right. It all kind of runs together; I am sure.
A. Yes.
Q. What is your understanding of the role that you are playing in this case as an expert?
A. When Mr. Steele contacted me, he provided me with a defendants' expert report; and that is an attorney who, apparently, has some opinions about some of the claims in the case.
My understanding is that I was to review that opinion, review some of the documents that have been produced in discovery and filed in the case, as well as other documents, as appropriate, and see if my opinions match the defendants' expert.
Q. Now, you referred to the defendants' expert disclosure. Is it your understanding, based on your review of that expert disclosure -- and I will represent his name is Stephen Hardesty.
In reviewing Mr. Hardesty's expert disclosure, is it your understanding that his expert opinion was responsive to two other experts named in this litigation?
A. It may have been partially in response to them.
Q. Your understanding was that his expert opinion

was partially responsive to two other experts in this litigation?
A. Yes.
Q. Did you review the reports of the other two experts?
A. There is an expert, I believe, with the last name of Emery. I reviewed some of the exhibits to that report. I have not looked at any of the opinions or the substantive portion of the report of any of the other experts, other than Mr. Hardesty.
Q. You do not know whether you even agree with the other experts that the plaintiff has set forth in this case?
A. No. I made the decision not to review their opinions so that my opinion could be independent of theirs.
Q. So you have no idea about what they intend to testify to at trial?
A. I don't, at this time, no.
Q. You mentioned that your understanding was that Mr. Hardesty's expert disclosure was only in part responsive to the two other named experts in this case.
Do you recall a specific conclusion or opinion of Mr. Hardesty's that was not responsive to the opinion of the other experts?

A. Well, I think I would have to look at that report. I don't recall.
(Deposition Exhibit No. 2 was marked.)
BY MR. McGEE:
Q. I have handed you what has been marked as Exhibit 2, Defendants' Expert Witness Disclosure. Why don't you take just a couple of minutes to run through this and refresh your recollection?
A. I mean, just for instance -- I haven't reviewed the whole thing there -- the subject matter of the testimony, which begins to be described on page 2, indicates that two of the subject matters have to do with other plaintiff's experts; and one of them has to do, just generally, with the claims of the case. That is for instance.
Q. Do you know whether the opinions and legal conclusions of Richard Kahn and Ms. Emery address duty, breach, causation, and damages related to the alleged negligence in the commencement of foreclosure of the plaintiff's loan?
A. I can't be sure. I don't know.
Q. That is because you have not reviewed the opinions of either of those experts?
A. That's right.
Q. So is it fair to say that your opinion is just

simply to rebut any testimony by Mr. Hardesty?
A. That may be so.
Q. I guess what I am asking you is: Is your role in this litigation to advance any opinions, as far as you know?
A. To advance any opinions?
Q. Yes.
A. I believe so, yes.
Q. So your role is not limited to rebutting the testimony of Mr. Hardesty?
A. It may be. I think that -- I'm not sure I understand your question.
Q. Maybe this is semantics.
I guess what I am getting at is this: Is your role in this litigation limited to addressing or responding to any opinions of Mr. Hardesty, or do you intend to advance opinions that are not responsive to Mr. Hardesty's opinions?
A. I don't believe that I have been asked to or that I have developed any opinions that are not within the same scope as Mr. Hardesty's opinions. I worked off of this document, and I was looking at whether or not my opinions matched Mr. Hardesty's.
Q. Why don't we, just real briefly, run through this? I am starting at page 4, here, "Substance of

Opinions."

About half-way down the page, it states, "Mr. Hardesty is expected to testify that he disagrees with Mr. Kahn's opinions and legal conclusions about what is required to process a trust deed foreclosure in Idaho."

Do you intend to offer an opinion about Mr. Hardesty's disagreement with Mr. Kahn's opinions?

A. It's hard for me to say because I don't know the substance of Mr. Hardesty's opinion.

Q. Do you know the substance of Mr. Kahn's opinion?

A. No.

Q. So how do you expect to offer any rebuttal testimony?

A. Well, I suppose, if Mr. Hardesty's opinion, which is not in here, becomes known, then I may or may not rebut it.

Q. Do you think Mr. Kahn would be able to rebut it?

A. I don't know. I don't know.

Q. The next one states, "Mr. Hardesty is expected to testify that he disagrees with Mr. Kahn's opinion and legal conclusion about the impact of MERS's role as a nominee beneficiary on the enforceability of a loan in Idaho."

Do you intend to offer an expert opinion in that regard?

A. With regard to MERS's role as a nominee beneficiary on the enforceability of a loan in Idaho? Yes.

Q. What about with respect to Mr. Kahn's opinion about MERS's role?

A. I don't have an opinion about Mr. Kahn's opinion because I don't know what it is.

Q. Do you intend to advance your opinion about MERS's role as a nominee beneficiary on the enforceability of a loan in Idaho?

A. I may intend to, yes.

Q. Why do you qualify it? Why do you qualify it by saying "may"?

A. I mean, I suppose -- this is kind of the problem with this document. Later on, there is some hint, I would say, in some of these later paragraphs, as to what Mr. Hardesty's opinion actually is.

Essentially, what this document describes is that Mr. Hardesty has some opinions about particular topics. In a couple of places, you get a hint as to what that opinion might be.

Like, for instance, on page 5 of the document, "Mr. Hardesty is expected to testify that the assignment

or sale of a loan in the secondary mortgage market does not render the trust deed securing payment of a promissory note 'bifurcated' and unenforceable."

That's an example.

So when there is this glimmer of an idea of what Mr. Hardesty's opinion actually is, then I can say, yes, I have an opinion about that that I would expect to advance.

In the case of the general descriptions, what I have been forced to do is -- and this is in some cases, not all -- come to a conclusion in that general area. In the event that -- well, I mean, I suppose that this is Mr. Steele's decision and not mine.

In the event that -- or Mr. Renshaw's, for that matter.

In the event that Mr. Hardesty's opinion does not match with mine -- I think I have described mine, I hope, pretty clearly in my report -- then it may be that I would advance that opinion.

Q. So I am still curious. In light of just these two that we have gone over here -- disagreement with Mr. Kahn's opinion about the process for a trust deed foreclosure and on MERS's role as a nominee.

I am curious as to why you did not, at a minimum, review Mr. Kahn's opinions in that regard. I

would assume that would clue you in, at least, to the nature of Mr. Hardesty's disagreement.

A. That was something I considered, but I made the decision not to do that because I felt that I could be more independent and more valuable to the court if my opinion was developed independent of anyone's but Mr. Hardesty's.

Frankly, it is pretty much independent of Mr. Hardesty's because I am not really entirely sure what his opinion is.

Q. Has Mr. Steele provided you with a deposition transcript from Mr. Hardesty?

A. No, not that I know of. If so, I haven't reviewed it.

Q. Would you expect a deposition would flesh out Mr. Hardesty's opinion?

A. If it was well-conducted.

Q. This third one, here, says, "Mr. Hardesty is expected to testify that he disagrees with Mr. Kahn's opinion and legal conclusion that securitization, even assuming it had occurred in this case, somehow affects the enforceability of the loan."

Do you intend to offer an opinion as to whether securitization affects the enforceability of the loan?

A. I am not sure that -- I don't recall having a

conclusion or an opinion about securitization, specifically. It may be that, indirectly, securitization is related to these topics that I would have an opinion about.

Q. As far as you recall, you do not have an opinion about whether securitization, alone, affects the enforceability of the loan?

A. Securitization, just by itself?

Q. Yes.

A. I don't believe that is in my report. If it is, we can take that up at some other time.

Q. The next one says, "Mr. Hardesty is expected to testify that the assignment or sale of a loan in the secondary mortgage market does not render the promissory note paid in full and unenforceable."

Do you have an opinion in response to that?

A. In the same way that I may have an opinion about securitization, I don't believe that my report specifically has a conclusion about assignment or sale rendering a note paid in full; but it does have some discussion of the enforceability of a promissory note after assignment or sale.

Q. Would you advance an opinion that the sale of a note or the transfer of a note or the negotiation of a note from one lender to another renders that note paid

in full as to the obligor?

A. As to this case? No.

Q. Turning to page 5, the next little paragraph states, "Mr. Hardesty is expected to testify that the assignment or sale of a loan in the secondary mortgage market does not render the trust deed securing payment of a promissory note 'bifurcated' and unenforceable."

We just discussed this a little bit. Do you intend to offer an opinion about that issue?

A. Yes.

Q. And what is your opinion there?

A. Well, in the most general terms, the assignment or sale of a loan could render the note or the trust deed unenforceable. It could bifurcate the note and the deed. It could limit the validity of foreclosure or foreclosure proceedings.

Q. Can you elaborate on the term "bifurcate"? Describe what you believe that term to mean.

A. I think the most general way of describing it is the question of whether or not, at a particular time, when somebody wants to do something, they have not only the right to enforce a note, either a note that they hold or a note that they own, while, at the same time, they can exercise the right to accelerate and sell at a trust sale that is given to them or somebody else in a

particular trust deed.

There are occasions when -- for instance, I may have the contractual and common law and other rights to exercise certain rights under a trust deed; but, at the same time, you may, rather than me, have the right to collect and be paid sums owed under a note.

In that occasion, particularly depending on the relationship between you and I, I think I would describe that note as bifurcated. I don't know if you would describe the note or the deed as bifurcated, but the note and the deed are bifurcated at that time.

Q. Now, you mentioned the relationship, in your example there, between you and me. In your opinion, if the two of us were working together to enforce a debt owed by a borrower, would that bifurcation impact enforcement of the note and foreclosure of a deed?

A. It could.

Q. How is that exactly?

A. Well, it depends on what that relationship is, and it also depends -- it depends not entirely on what that relationship is. It also depends on how what is going on appears, that it is transparent to the other people involved in the transaction, including, most specifically, the homeowner in a foreclosure situation.

Q. You seem pretty familiar with this stuff. Have

you reviewed the opinion of -- I keep forgetting who authored the opinion. It was the matter of, I believe, Meyer v. Bank of America. It was a magistrate opinion. I believe it was Judge Bush. Have you reviewed that opinion?

A. Yes.

Q. It was the discussion of two entities working together in a case where you have a note held by one entity and a deed of trust in another entity's name. The two of them were working together to collect a debt. You are familiar with that case?

A. I am familiar with the case, but I don't recall right now the specific discussion in that case.

Q. Do you disagree with that opinion?

A. Like I said, I can't remember specifically what the discussion was in Meyer and what the conclusion was in Meyer. I would have to look at it to tell you whether I agree with that.

Q. Fair enough.

So with respect to this case, in particular, do you have an opinion about whether the trust deed and the promissory note are bifurcated?

A. If I recall right, it appeared as though -- and I think there may have been an admission or a discovery response to suggest that -- I believe my opinion is that

it appeared likely -- I don't think I discussed bifurcation, specifically, in the report; but it may have been alluded to that it appeared likely that whoever was exercising the rights under the trust deed at the time they were attempting to exercise them was probably also not entitled to enforce the note at that time.

Related to that -- we always have to go back to the other half of this -- is that it could have been confusing, misleading, deceptive because of the bifurcation, if that existed at the same time.

Q. This next sentence, here, says, "Mr. Hardesty is expected to testify about the distinction between loan owners and holders of negotiable instruments."

Do you have an opinion about the distinction between loan owners and holders of negotiable instruments?

A. Yes, I do.

Q. What is that opinion?

A. There is a distinction between loan owners and holders. That distinction is set out, primarily, in Articles 3 and 9 of the Uniform Commercial Code. There is also some common law, I think, that applies.

Q. Is it your opinion that Article 9 plays a role in matters of trust deed foreclosure?

A. Yes.

Q. And what is that role, in your opinion?

A. It provides, in many, if not all, instances, some of the governing law.

Q. The next line here states, "Mr. Hardesty is expected to testify about MERS's broad authority as nominee for the originating lender, as well as the originating lender's successors and assigns."

Do you intend to offer an opinion about that issue?

A. Yes.

Q. And what is your opinion?

A. I think, in my report, I alluded to the fact that, number one, at the time of the report and, I believe, still at this time, today, there is no -- well, certainly, we can say that still, today.

Unless something has happened while we have been here, there is not a reported decision from an Idaho appellate court on the matters of state law that would definitively address the authority of MERS in this case, number one.

Number two, the trust deed in this case that I have reviewed, particularly when read in combination with other documents in the Ada County records, limits MERS's authority as nominee. It pretty clearly

circumscribes it.

There are other cases and documents that many question; and some from around the country would even further limit MERS's authority beyond the extent to which it is circumscribed in the trust deed language, itself.

So my opinion about MERS's authority is not that it is broad, as nominee.

This paragraph also alludes to the lender's successors and assigns. I have an opinion about that, as well -- it might be part of that same opinion -- because, in this case, the lender, I don't believe, had a successor. It was the successor of another entity, but it did not have a successor.

If it had an assign, if it had an assignee, with respect to the trust deed or, for that matter, to the note, it is not clear to me, from what I have reviewed, that the homeowner was aware that there were any successors or assigns, assignees, of either the trust deed or the note.

Q. So your opinion on the issue, at least in part, sounds like it is your interpretation of Idaho law? Is that a fair assessment?

A. In part.

Q. And the other part would be your review of the

trust deed?

A. There would be several parts to it.

Q. Will you describe those for me?

A. Part of it is an understanding -- an opinion about Idaho law. Partly, it is an opinion about the law, generally, concerning MERS. When I say, "the law, generally," I mean the law and trends in the law.

Then there is another component to this which has to do with, among other issues that I believe are still pending in this case, the Idaho Consumer Protection Act and common law having to do with acts that are misleading, confusing, deceptive.

Q. It sounds to me like what you are saying is that your opinion on this issue is an interpretation of Idaho law which would include, presumably, the Idaho Trust Deed Act, Idaho state court authority interpreting the Idaho Trust Deed Act, Idaho's adopted UCC 3 and UCC 9, and another statutory framework, the Idaho Consumer Protection Act, in addition to what you described as trends in the law.

So other than the trends-in-the-law issue, your opinion does appear to be your interpretation of Idaho law? Is that a fair assessment?

A. Well, again, we have this stumbling block. This is one of these examples where Mr. Hardesty gives

us a glimmer of what his opinion might be by using the term "broad." So I am left to kind of guess beyond that.

Ultimately, I believe, in the case, at trial, my opinion could potentially be an interpretation of law. If Mr. Hardesty were to offer an interpretation of law, and if my opinion of the interpretation of the law were to differ, then, yes, it would be an interpretation of the law.

Q. So, in other words, if I am understanding what you are saying, you do not intend to offer an opinion on this matter unless Mr. Hardesty offers a legal interpretation of the law that you disagree with?

A. I don't know. That would be a question for Mr. Steele and Mr. Renshaw, as to how they intend to -- or, for that matter, for yourself and your client -- as to who calls me at what time and to do what.

Q. Do you feel comfortable giving your opinion to the court about an interpretation of the law, in an expert capacity?

A. It seems a little unusual, but it seems to me that it would be even more unusual for a court to allow one side to have a lawyer give an opinion about the law and not allow the other side to offer their opinion of the law.

Q. Again, this kind of comes back to the opinions propounded by Mr. Kahn and Ms. Emery, which you have not reviewed.

You noted that you reviewed this particular document provided by the defendant in this matter, this expert disclosure of Mr. Hardesty that we are going over right now.

Did you review the materials submitted in discovery to the plaintiff in this matter and upon which Mr. Hardesty intends to rely?

A. Are you referring to a particular portion of the discovery responses or all of them?

Q. Perhaps Mr. Steele did not delineate them this way, but there was a supplemental document production that corresponded with this opinion. I will represent that it constituted, largely, legal opinions and decisions from Idaho courts.

Did you have an opportunity to review those?

A. I believe that I reviewed what you are referring to. There is a segment of discovery document production in this case that is about 250 or 260 pages long; and that consists of opinions -- Meyer is among them, I believe -- from Idaho state and federal courts. I have reviewed those, yes.

MR. STEELE: Matt, could we take a short break in the next few minutes?

MR. McGEE: Yes. I have just a couple more questions, and we will take a break.

MR. STEELE: Sure.

BY MR. McGEE:

Q. Have you reviewed Judge Winmill's opinion about MERS's broad authority as a nominee for the originating lender?

A. Do you remember the case name?

Q. I believe he set it forth, at a minimum, in a case called Hobson.

A. I have read Hobson. Like Meyer, I don't recall specifically what the discussion and the conclusion was. If you want me to have an opinion about that, I would have to look at it again today.

Q. If I were to represent to you that his opinion was, essentially, the same -- well, his use of the term "broad authority" was found within that opinion -- you would just disagree with that opinion?

A. Again, I may. I would have to look at it because I doubt -- I doubt strongly that there is any opinion that I would disagree entirely with. When I say "opinion" here, I mean the text of a full decision.

There may be portions of decisions that, unfortunately, were probably not briefed correctly and

end up wrongly decided.

Q. So when you say "not briefed correctly," it sounds like you might be attributing the judge's getting it wrong to either counsel or, in the event it was a pro se, a pro se plaintiff not correctly presenting the argument to the court?

A. I think I even discussed this specifically in my report. I mean, just to say it succinctly, I mean, if Moffatt Thomas were representing the homeowner, generally, and if the lender were pro se, I think we would see different case law.

MR. McGEE: Let's go ahead and take a break.

(Break taken.)

BY MR. McGEE:

Q. Mr. Eppink, we are kind of running through the expert disclosure here. The next line, here, states, "Mr. Hardesty is expected to testify that Ms. Emery's opinion that there is a 'cloud' in the chain of title without an assignment of a deed of trust by MERS is incorrect."

Do you intend to offer an opinion in that regard?

A. Yes.

Q. And what is your opinion?

A. That there is a "cloud" in the chain of title

in this case.
Q. Can you elaborate on that?
A. There is no assignment from MERS. The Notice of Default references MERS, or something related to MERS. The original lender, which I believe has been admitted, had no interest in the note or the deed of trust by the time the Notice of Default was issued.
Idaho law clearly requires an assignment. In fact, MERS, itself, shortly after this foreclosure, clearly required an assignment and even threatened sanctions against MERS members who pursued foreclosure proceedings in MERS's name which is, in a non-judicial state, effectively putting MERS on all of the documents.
So if you want to describe the players in this foreclosure, the foreclosing entity, as not doing what they were required to do as a "cloud," then I would describe that as a "cloud" in the chain of title. Yes, there is a "cloud."
Q. Just to back up, you mentioned that the Notice of Default referred to a lender that no longer had anything to do with the loan?
A. Yes. It is my understanding, from reviewing the interrogatory answers and the admissions and other things like that, that it was Homecomings Financial, LLC -- I think that is what it was -- and that, by the

time of the Notice of Default, it is my understanding that the lender was Freddie Mac, as popularly described. At least, that's what MERS's own documents describe.
Q. The lender or the owner of the loan?
A. It's not clear to me what it is. In any event, I believe that there is an admission or -- I am recalling an admission or a discovery answer that says Homecomings Financial had no interest.
There is an admission or an interrogatory answer that says that MERS had, at least, no economic interest in the transaction, if you will. So that's what I believe.
Q. What is your understanding of what MERS's role is in these transactions?
A. MERS was acting solely as nominee for Homecomings Financial. I believe that's what the trust deed says.
Q. Do you know whether they were acting, when the Notice of Default was executed, if you recall -- we can look at it, if you would like. Do you know if they represented they were acting as the nominee for Homecomings in that Notice of Default?
A. I believe the Notice of Default refers to MERS or something related to MERS. When I say "MERS," I am talking about MERS and other -- MERS is several

entities, and they have changed over time.
If I can, I will just use "MERS" as an abbreviated way of talking about it. If we want to get the Notice of Default out, we can identify specifically which entity it was.
It refers to some MERS entity; and it refers to Homecomings Financial, I believe. I believe the trustee is mentioned in the Notice of Default; but, otherwise, it's completely opaque.
Anybody trying to discern, from the Notice of Default, either what to do or who had the beneficial interest at that time would have been unable to do it.
MR. McGEE: Maybe we can look at the Notice of Default.
(Deposition Exhibit No. 3 was marked.)
BY MR. McGEE:
Q. So you just testified that it would have been -- I am not sure what your exact words were -- difficult or impossible to know what to do upon receiving this Notice of Default. Is that a fair characterization of what you just stated?
A. Yes.
Q. Let's look at the second paragraph from the bottom there. It provides, "All delinquencies are now due, together with unpaid and accruing taxes,

assessments, trustee's fees, attorney's fees, costs and advances made to protect the security associated with this foreclosure. The unpaid principal balance of $236,250 together with interest thereon at the current rate of 7.5 percent per annum from 4/1/2010 until paid."
What is this? If you received this, what would this mean to you?
A. This would mean that somebody is claiming that -- this would be, effectively, "Mr. Eppink, you owe $236,250 if you want to avoid losing your house."
Q. It sounds like your opinion is that a borrower would not know who to pay? Is that fair?
A. Even if a borrower could determine who to pay or would want to pay someone they customarily paid, in as serious a life occasion as this, if someone was able to pay $236,250 plus the interest, it would be very difficult to know what to do, from this document, particularly since, as it turns out, as it appears to me, any of these entities -- if any of the entities mentioned on here were to be paid, the person who actually -- the entity that actually had the note or could enforce the note or owned the note could seek to collect that amount, as well.
It is particularly odd, given how simple it would have been for, at least, MERS to have identified

in this notice who it was that was entitled to payment because I don't believe, given my review, that any of these entities were entitled to payment of that money.

Q. So this is the recorded document required by the Idaho Trust Deed Act; right? I mean, this is something that is required to be provided to a trustor or a grantor of a deed of trust as part of the non-judicial foreclosure process; correct?

A. Well, I mean, yes. There is a notice of default that is required by the Idaho Trust Deed Act. This may be the instrument that was generated in an attempt to comply with that.

Q. Now, are you aware of any other communications that a lender may have had with Mr. Renshaw about coming current on his loan or identifying his default, other than this publicly-recorded document?

A. I think I have reviewed others.

Q. Do you recall whether those documents identified specifically how he could bring his loan current?

A. I don't recall right now.

Q. In other words, Mr. Renshaw may have known exactly how to bring his loan current, setting aside this document; correct?

A. It could be, yes.

Q. Now, since this has been a source of confusion with a couple of the other experts in this case, I would like to clarify what is happening here with respect to the reference to Homecomings Financial, LLC.

Is it your understanding that this Notice of Default identifies Homecomings Financial, LLC, as, at this time, having anything to do with the loan?

A. As a lawyer, parsing this document, I believe Homecomings Financial is referred to here as a way of describing the deed of trust, the trust deed.

I do not think that is the purpose of the Trust Deed Statute or the Consumer Protection Act, for that matter. The purpose is whether or not a homeowner receiving one of these would be able to parse that document.

Given the fact you have just told me it has been a source of confusion for other experts, I mean, this document is written in a -- I don't think there is any other way to describe it than obfuscatory. I mean, it is opaquely written in a way that is not necessary under the Trust Deed Act or otherwise.

Q. Again, you are not aware of whether Mr. Renshaw was actually, indeed, apprised to whom he was supposed to make payment and other details associated with paying off his loan?

A. If I am, I can't recall.

Q. Let's turn back to the Expert Witness Disclosure. That is Exhibit 2, I believe; correct?

A. Yes.

Q. I guess we kind of need to flesh out your opinion on this "cloud" without an assignment of the Deed of Trust by MERS.

You referred to, I think, a change of practice by MERS, a sanctionable change of practice by MERS, after the initiation of foreclosure in this case; is that correct?

A. Yes.

Q. Do you know the reason for that sanctionable change of practice?

A. I don't know the reason, no.

Q. Where did you discover this change that resulted after the initiation of foreclosure in this case?

A. It would have been in any number of materials I have reviewed to keep current on the status of foreclosure law in the country.

Q. Is it possible that it is a result of holdings by courts in other jurisdictions?

A. It is certainly possible, yes.

Q. Are you aware of any Idaho authority that

stands for the proposition that there must, in fact, be an assignment of the deed of trust from MERS to the lender prior to initiation of foreclosure?

A. Yes.

Q. What authority is that?

A. That may have been touched upon in the Ralph decision. It was also recently touched on, if I recall correctly, in another Judge Bush decision from earlier this month.

Q. Do you recall the name of that decision?

A. I believe it's Anderson v. Deutsche Bank. That's a Report and Recommendation as of, maybe, last week or the last time I looked at it. I don't know whether there have been objections filed or whether it has been adopted.

Q. Do you recall the holding in that regard from Judge Bush? I mean, I don't expect you to say it word for word.

A. Right. If I recall correctly -- I mean, obviously, we could both turn to it and see it exactly. If I recall correctly, Judge Bush discusses -- the argument on the part of Deutsche Bank was that, "Well, we didn't do everything exactly right; but it didn't really matter because the homeowner knew what was going on."

Judge Bush says, "No. The Idaho Legislature said what it said. I don't have the authority to decide which variations from the Trust Deed Act are important and which variations are not. So you have to comply with it." If you don't comply with it --

Q. Specifically, he addressed this?

A. That's what I am trying to remember. I think it was something in Idaho Code 45-1505, and I think it was assignment. It may have been appointment. I think it was either assignment or appointment.

Q. When you refer to "appointment," do you mean appointment of a successor trustee?

A. Yes, a successor trustee.

Q. So in your expert opinion -- and maybe we will get to this when we talk about your report a little bit more -- would it be sufficient in this case -- I suppose I should qualify this by representing that GMAC Mortgage was identified to the plaintiff as the servicer.

Maybe I should start by asking you: Do you equate servicer with lender? This is part of the semantics discussion, I guess, that goes on. Is there a relationship between servicer and lender that you are aware of?

A. There are relationships between servicers and lenders, sub-servicers, and so on.

Q. So do you understand the lender to be the owner of the mortgage debt?

A. Well, unfortunately, it seems to be different in every case. I guess it is not different in every case.

It is very difficult for the homeowner or the homeowner's attorney, without extensive discovery, to determine what relationships the various entities have. The lender could be the owner, in UCC terms. The servicer could be the owner, in UCC terms.

Q. As long as the borrower knows who he or she has to pay, do the contractual relationships between lenders, owners, and holders all really matter?

A. It does. It potentially can have legal significance. It can potentially subject someone to exposure on the same debt twice or, at least, payment on the same debt twice.

Q. Explain that.

A. Well, I think it's better described -- I'm trying to remember which case discusses this. It has been cited since then by Idaho courts for only a portion of the discussion.

There is a lengthy discussion of this in In Re: Veal from the Bankruptcy Appellate Panel of the Ninth Circuit, and a portion of it has been cited by the

District Court, District of Idaho, about whether or not the owner makes a difference to the homeowner.

In the general circumstance, during the course of a loan, I am paying that loan, as a homeowner -- it is certainly the opinion of the Bankruptcy Appellate Panel of the Ninth Circuit that that difference shouldn't make a difference to the homeowner.

However, in the case of a foreclosure, it does make a difference because the owner may not be entitled to enforce the note.

So that is one example where that difference may have a legal significance and, potentially, could subject the homeowner to multiple collection efforts, among other bad consequences.

Q. So it sounds like what you are saying is, as a practical matter, if a person does not know who actually owns their debt, it matters because a foreclosure might occur; and then somebody could show up later and try to enforce the note? Is that the general idea?

I mean, you are talking about duplicative collection efforts, and I am trying to figure out how that would occur.

A. Well, let's say I am the owner of a note; but I am not entitled to enforce it when I choose to enforce it.

Beyond the fact that, you know, we are a nation of laws, if there is someone else entitled to enforce it -- let's say you are entitled to enforce it -- you may choose to enforce that note, even though I am the owner of it. I am not entitled to enforce that note at that time.

So, naturally, that is a practical problem, beyond the simple legal problem. You know, the reason why the Idaho Legislature has adopted laws governing who is entitled to enforce the note is, presumably, in the interest that they be followed.

Q. Again, my question is: How would a borrower be subject to duplicative collection efforts?

A. Well, I think I just described that. If I am not entitled to enforce a note and I enforce it, that means that, number one, at the very least, the person entitled to enforce the note could attempt to enforce it against me.

If we live in a world in which anyone who is not entitled to enforce a note can enforce that note, then that means everybody in this room could attempt to enforce a note against me.

Q. I think I understand what you are saying.

So if you own the note but you are not entitled to enforce it, and if I hold a note and I am entitled to

enforce it, and if you go ahead and foreclose, in theory, I could try to enforce the note against that borrower, also? Is that what you are suggesting?

I think you used the word "attempt." I could attempt to enforce that note, maybe not by foreclosure but I could just say, "Hey, I have this note; I am the holder"? Is that kind of what you are getting at?

A. Well, I mean, the reason why someone is entitled to enforce the note -- well, I don't know that this is the reason. It appears to be the policy of the UCC that, at any given time, one person is entitled to enforce a note.

There are a series of sections that help us identify who it is that is entitled to enforce the note at any given time.

What I am saying is that it appears to be the policy, to me -- and it is a good policy, at that -- that, at any time, with any given note, only one entity is entitled to enforce it.

If, as you are suggesting, there would be multiple people at any given time entitled to enforce a note, then, yes, anybody that is exposed to, at the very least, the hassle of trying to get a court to identify who is entitled to enforce this note.

The other side of this that ties into opinions

we have discussed today is the fact that it is very easy for those who own or hold notes to make that very transparent to the borrower.

It is very difficult for the borrower, particularly because of securitization and otherwise, to identify who holds, owns, and otherwise their note. At the time of foreclosure, that's a key moment for everybody involved in that transaction.

I believe that it appears that the Trust Deed Act, the UCC, the Consumer Protection Act, and all of these laws operate to provide strong incentive, if not sanction, to those who would not make that transparent at that key moment.

Q. Are you aware, in this case, of whether there have been duplicative efforts to enforce the note? By "duplicative efforts," I mean, are there multiple people saying, "You need to make payment to us"?

A. That is probably a question for Mr. Renshaw.

Q. I am just asking. I mean, it sounds like you have reviewed at least some of the pleadings. Are you aware that that is a contention in this litigation?

A. Well, it seems as though, to me, if I read the Notice of Default in a reasonable way -- perhaps a competent real estate lawyer might read it in a different way.

If I read the Notice of Default in a reasonable way, it could be that at least three different entities are seeking payment. That is not to even look at some of the other documents in the land records and other notices.

I don't know how many entities are seeking payment through this foreclosure. I imagine there are several. It is certainly not clear, from this document, who that is.

Q. When you say "this document," are you referring to Exhibit 3?

A. I am referring to Exhibit 3, the Notice of Default.

Q. I am returning to Exhibit 2 here. "Mr. Hardesty is expected to testify that even if Ms. Emery's opinion and legal conclusion that a foreclosure statement without a MERS assignment creates a potential 'cloud' on the title for purposes of insuring title, Plaintiff would not be damaged or impacted by such 'cloud' in the event the sale went forward."

Maybe we just went over this issue. Maybe we have just addressed it. Do you intend to offer an opinion responsive to this?

A. Yes.

Q. And what is that opinion, if it is different

than what we have just discussed?

A. Well, this one goes to whether or not -- I mean, the previous one seems, to me, to go to whether there is a "cloud;" and this one seems to go to whether or not that "cloud" causes a problem.

It is my opinion that that "cloud" does cause a problem. In fact, it causes a problem that could result in what the law calls damages.

Q. Can you elaborate on that a little bit?

A. Well, first of all, as in this case, it appears, at least -- and in other ways -- number one, there are statutory damages under the Consumer Protection Act of, in some cases, $1,000 at minimum and, in other cases, $15,000 at minimum for doing things in a consumer transaction that, for instance, would be misleading or likely to cause confusion for the consumer.

I don't think it is difficult to imagine -- in my experience, I have witnessed it -- the simple act of confusing someone, whether intentionally or negligently, when it comes to their primary residence, their only shelter for themselves and their family.

It can, at the very least, result in what has appeared to me to be extreme emotional distress, leading to things like -- in one of my cases, it led to the

inability to sleep, extreme irritability, and exacerbation of existing symptoms that wouldn't have occurred otherwise.

It is a serious thing that I didn't even fully appreciate until I sat across the table from so many people receiving these notices.

Q. Do you have an opinion about whether Mr. Renshaw has experienced any of these ill effects, I assume, or these extreme emotional distress symptoms?

A. To my knowledge, I have never seen or met Mr. Renshaw.

Q. So you are not intending to offer an opinion about emotional distress to Mr. Renshaw, are you?

A. As to whether Mr. Renshaw has experienced it?

Q. Right.

A. No. I don't know whether he has or not.

Q. I am going to the next couple of sentences here. "Mr. Hardesty is expected to testify the Defendants did not breach any duty owed to Plaintiff. He is expected to testify that, even if there was a breach of a duty owed by any of the Defendants, such breach did not cause Plaintiff any damages."

Do you intend to offer an opinion in response to Mr. Hardesty's opinion there?

A. Yes.

Q. And what is that opinion?

A. It's similar to the one I just described, but it goes beyond simply the "cloud," as Mr. Hardesty described it and as we have been talking about it, to other breaches of duty or apparent breaches of duty, going beyond simply the lack of an assignment and the confusing Notice of Default.

Q. Now, you are aware that, at the trial of this matter, the only defendant is Mortgage Electronic Registration Systems, Inc.; correct?

A. I am not -- I am aware that two of the other -- I believe there are three defendants, and two of them are -- there is a suggestion of bankruptcy and a pending petition. I think it is still pending. I don't know -- I am not aware if they have been dismissed from the case.

Q. Right. A stay has been entered.

A. Right. So assuming that stay remains in place, I would imagine they would not be on trial.

Q. Let's narrow this a little bit. With respect to MERS, can you identify for me what duty, in your opinion, MERS has to Mr. Renshaw?

A. Well, conceivably, if MERS has it the way it has argued, I believe, in this case, then MERS was standing in the place of the lender.

If that is so, then I think they owed all of the duties the lender and the lender's servicer and sub-servicers would have owed to Mr. Renshaw. If that is not so, then, perhaps, there is a different analysis.

You know, if asked about particular things that occurred, I think I could -- I think I have an opinion about certain things, as to whether or not they are breaches of duty.

I don't believe I have an opinion and I haven't reviewed the materials for the purposes of formulating an opinion as to, under different scenarios, whether MERS was particularly responsible for those.

My report, which I prepared prior to the bankruptcy petition, refers to the foreclosing entities, meaning all three of the defendants.

Q. Is it your understanding that the Notice of Default has been rescinded in this case?

A. I think I have seen a Rescission of the Notice of Default in the land record.

Q. What does that Rescission of the Notice of Default mean to you?

A. I would have to look at it again. I mean, I think, generally, a Notice a Rescission of Default indicates that, as to the previous Notice of Default, the foreclosure proceedings described in the Trust Deed

Act are no longer pending.

Q. Is it your understanding that Mr. Renshaw still lives in his home?

A. I think I have a vague idea that that might be so. I would imagine it's so.

Q. Do you know whether Mr. Renshaw is paying his mortgage?

A. I don't know.

Q. Is it your expert opinion that Mr. Renshaw does not have to pay his mortgage?

A. I'm not sure I understand the question.

Q. Do you have an expert opinion that Mr. Renshaw does not have to pay off the debt that he incurred when he took out the loan in 2007 as a result of any of the deficiencies that you may or may not see in this case?

A. I don't think I have developed an opinion about that.

Q. Will you describe for me what your understanding is as to what MERS is? What is Mortgage Electronic Registration Systems?

A. Do you mean the concept of MERS, or do you mean the particular entity?

Q. Specifically, the plaintiff has named Mortgage Electronic Registration Systems, Inc., as a defendant in this matter. I want to know what you understand that

entity to be.
A. Mortgage Electronic Registration Systems, Inc., is part of several related entities that I think we have been describing in an abbreviated way as "MERS" today.
Q. What are these several related entities, if you know?
A. There is MERS Corp., I think, still. I don't know. I haven't kept track closely of the formal way that the entities are structured.
Q. Let's talk about the concept of MERS, as I think you have used that term. What is your understanding of that concept?
A. Well, I believe MERS -- I will use "MERS" to refer to that group of associated organizations. At least one service that MERS provides is -- MERS has members.
Those members use MERS as a way of, basically, transferring interests in mortgages, if you will, as a way, among other things, of avoiding costs that they would otherwise have. It is sort of like a substitute for the land records system.
Q. I think you used the phrase that it is a way to transfer loans. Is it your understanding that MERS is actually a way to transfer loans, or is MERS a way to

track transfers between members?
A. It seems to be, as I understand it, more correct the way you have described it, which is to say that it is a way of tracking those transfers. Yes.
Q. Are you familiar with how the concept works, how MERS works, other than what we have just discussed, that it is a way to track the transfers of interests in loans?
A. Only generally.
Q. Can you describe what you do understand?
A. I think MERS has a registry or a record. I mean, I have seen -- I believe there is one in this case.
MERS tracks the transfer and, otherwise, the change in possession of notes, promissory notes, and trust deeds and, I believe, even trustees with respect to trust deeds; and it allows its members to access that.
Then, at key times, it may be involved -- I'm not certain of this, but it may be involved -- in identifying times when things actually need to be recorded in county records.
Q. Now, does MERS actually affirmatively track those issues; or is MERS, basically, you know, just an electronic database for its members to access and use?

I mean, do the members -- I guess I should strike that question.
Do members actually enter the information on the system, or is there somebody at MERS who actually enters the information?
A. I mean, members can enter information -- that is my understanding -- but I imagine there are also people at MERS.
Q. Do you understand it to be the case that a signing officer, a MERS certifying or signing officer for a given MERS member actually executes documents in MERS's name?
A. Can you repeat the question? I'm sorry.
Q. Yes. Is it your understanding, based on your research of these issues, when a document is executed in MERS's name, that it is a certifying or signing officer of a MERS member and not MERS, itself?
A. I am aware that there are a number of places where instruments related to MERS members get signed. I am also aware that it appears, from the documents I have reviewed and otherwise, that the physical individual who signs documents may, in some cases, represent, in those documents and otherwise, that they have authority to sign on behalf of various, different entities.
Q. Based on your understanding of how MERS works,

when a document is executed in MERS's name -- it says, below the signature line, "Assistant Secretary" or "Assistant Vice President" or something like that -- when that happens, is the person executing that document a paid employee of MERS?
A. I don't know, in any given case.
Q. In general, based on your understanding of the concept of MERS, is it the case that they are a paid employee?
A. In general, if I understand MERS's rules right, it would not be the usual case that MERS is paying the physical individual that is signing a document.
Q. Who is the individual that is signing the document in MERS's name?
A. I don't know, in a given case; and that is part of the problem.
Q. Have you reviewed a Ninth Circuit opinion called Cervantes v. Countrywide?
A. Yes.
Q. Are you familiar with the Ninth Circuit's description of how MERS works?
A. I am familiar with it. It has probably been a while since I have read Cervantes.
Q. In your expert opinion, did MERS initiate the foreclosure in this case?

A. I am not sure what you mean by "initiate."
Q. Did MERS, basically, tell the trustee, "Renshaw is not paying his bills, and we need to do a non-judicial foreclosure"?
A. I don't know, and I don't have an opinion about it.
(Deposition Exhibit No. 4 was marked.)
BY MR. McGEE:
Q. I have handed you Exhibit 4, the Rebuttal Expert Witness Disclosure. Attached to that Disclosure as Exhibit A is a Memorandum to Mr. Steele. It appears to be from yourself. It is dated May 10, 2012.
Have you seen this document before?
A. Yes.
Q. When I say "this document," obviously, I am referring to Exhibit A.
A. Yes. I have seen Exhibit A.
Q. Why don't you tell me what this document is?
A. This is a Memorandum I wrote for Mr. Steele after he asked me to review a copy of what has been marked in this deposition as Exhibit 2, after reading Mr. Hardesty's report and some of the other documents described in there. My conclusion is based on that review.
Q. These first couple of pages under "Background

and Experience" appear to describe a lot of the items that we have already discussed.
Are all of your statements set forth in "Background and Experience" true and accurate?
A. They should have been, at the time that I wrote them.
Q. Maybe I need to follow up. I don't think we ever discussed this. You indicated you are currently not employed at Idaho Legal Aid and that you are now employed with the -- it is the ACLU of Idaho; is that correct?
A. That's right.
Q. What do you do there?
A. My position is called Legal Director, and I am responsible for the legal program at the ACLU of Idaho.
Q. What does that entail?
A. Any number of things. It entails litigation, legislative relations, advocacy, design of advocacy programs, generally responding to requests for legal assistance, and coordinating with cooperating attorneys with the ACLU.
Q. In your position, who do you report to?
A. The Executive Director of the ACLU of Idaho.
Q. How many attorneys are at the ACLU of Idaho?
A. As far as staff attorneys? On staff, there is

one.
Q. In addition to yourself?
A. No.
Q. You are the only attorney there?
A. I am the only paid attorney, yes.
Q. And you qualified that by saying "paid." Are there attorneys that volunteer their time?
A. Yes.
Q. You mentioned that the ACLU of Idaho does get involved in some litigation. Is that a large component of the ACLU's role?
A. Yes.
Q. And do you appear as the attorney of record for the ACLU in those matters?
A. Yes.
Q. Do you do work similar to what you did at Idaho Legal Aid? Do you deal with housing issues?
A. Not currently.
Q. What kind of legal issues do you address?
A. All of them are civil rights cases.
Q. And by "civil rights," you are referring to exactly what?
A. Rights and liberties protected by the United States Constitution, federal statute, state constitution, and, in some cases, state statute.

Q. In your work at the ACLU, do you deal with foreclosure issues at all?
A. Not presently.
Q. Turn to page 3, "Scope of Review." Obviously, we have access to and we know about most of these on page 3.
Turn to page 4. At the very top, you refer to "MERS bulletins and announcements." What are you referring to exactly there?
A. I am referring to certain MERS bulletins and announcements that were produced by MERS and made available by MERS. I am pretty confident that all of those that I reviewed concerning this case are included on the DVD that I produced today.
Q. Great.
The second item down says, "Decisions and opinions of state and federal courts concerning pertinent issues."
Other than the decisions and opinions of state and federal courts that were produced concurrently with the expert disclosure of Mr. Hardesty, would the other decisions and opinions that you may have reviewed be on that DVD, as well?
A. No. That's what I was describing earlier. During the course of developing this Memorandum and,

just generally speaking, I would have been almost constantly reviewing -- maybe not "almost constantly."

I would have been daily, at least, reviewing decisions from state and federal courts, both inside Idaho and outside Idaho, not only with respect to this case but with respect to other cases at Legal Aid and, possibly, trainings and otherwise.

I haven't kept a record of which ones I have reviewed. All of those have gone into my general experience and knowledge. I am not able to provide for you all of those decisions and opinions that I have.

Q. Sure. Okay.

Does this third item here on this page fall into that same category, "Reports and findings of governmental, regulatory, and independent investigations of mortgage foreclosure practices"?

A. Yes, that would be the same thing. I mean, I think that, earlier in the report, I alluded to a couple of them, namely the report of the Inspector General of the United States Department of Housing, Urban Development -- I suppose it is not a report -- and the complaint and other materials that were filed by most of the Attorneys General in the United States concerning unfair and deceptive trade practices mainly by banks, lenders -- mainly banks, I guess, and servicers.

Q. If you recall, do any of these reports or findings specifically address MERS?

A. Yes. I believe that the HUD I.G. Report discusses MERS. I believe it does.

The other one, just off the top of my head, that I can recall that discusses MERS is a report which I believe was produced by the City of San Francisco -- or it might have been by the State of California. Specifically, it discusses MERS, if I recall correctly.

The National Foreclosure Complaint may discuss MERS. I can't recall.

Q. Have you reviewed any opinions of the Idaho Attorney General or any Idaho-specific investigations or reports related to MERS, or are you aware of any?

A. I am not aware of any A.G. opinions. I have, I believe, on one or two occasions, met with the Idaho Attorney General's Office about foreclosures; and MERS has been discussed. I don't recall there being any documents that came out of those discussions.

Q. You have got, "Amended Complaint in this case;" and then it says, "Decision and briefs concerning the summary judgment motions in this case."

Are you aware that there has been no decision concerning summary judgment in this case?

A. Well, I guess there was a decision -- if I

recall correctly, there was a decision on motions for judgment on the pleadings, and that was described as a memorandum decision and order concerning summary judgment.

Q. So this, "...concerning summary judgment motions in this case," maybe, was just describing briefs? Otherwise, you are referring to decisions, maybe, just in general?

A. What I am saying is that I think the decision on the motion for judgment on the pleadings was described by the court as a memorandum decision and order on summary judgment.

MR. McGEE: Fair enough.

Obviously, you have got, "defendants' expert Witness Disclosure."

Addressing the "Conclusions" section here -- what time do we have? Do you want to take a quick, five-minute break?

THE WITNESS: That would be good.

(Break taken.)

BY MR. McGEE:

Q. I am returning to your Memorandum to Mr. Steele dated May 10, 2012. Under the heading "Conclusions," you have a subsection titled "Failure to record assignments." I think we may have covered that already,

but I want some clarification.

At the bottom of page 5, you stated, "I understand that Steven Hardesty...may rely on MERS's 'Rules of Membership' in effect in 2010 to support his opinion that a failure to comply with Idaho Code Section 45-1505 would not 'cloud' the chain of title to the property involved."

Was that accurately stated? Have I read that correctly?

A. Yes.

Q. Where did you obtain this understanding?

A. It may have been from his report. I assume it was from his report. I think I assumed, because Mr. Hardesty referred, in his underlying data, to MERS's Rules of Membership in effect in 2010, that it might be the basis of some of his opinions, including the one about the "cloud" on the chain of title.

Q. Is it your understanding that Mr. Hardesty is an attorney?

A. That's what he says.

Q. Would you expect most attorneys to understand that internal standards and contractual covenants governing MERS members do not preempt state law?

A. I wish that I could.

Q. You think there may be some attorneys that

believe internal standards preempt state law?
A. I believe that there are attorneys who would argue that in foreclosure cases.
Q. Do you --
A. Not necessarily that they preempt state law but that, because an entity complied with MERS's Membership Rules, there is not a "cloud" in the chain of title.
Q. Do you know that to be Mr. Hardesty's opinion?
A. No. No. I don't really know what his opinions are very much at all.
Q. Are you aware of any contention by MERS or Mr. Hardesty in this case that MERS's Rules of Membership preempt state law?
A. I am not aware of any.
Q. Are you intending to advance an opinion on that issue?
A. On MERS's Rules of Membership?
Q. Yes, on whether or not MERS's Rules of Membership preempt state law.
A. Yes.
Q. What is that opinion?
A. My opinion is that they do not preempt state law and they, also, do not clear up a chain of title or a "cloud" in the title that would result because of

state law.
Q. Are you aware that Mr. Renshaw has actually placed the MERS's Rules of Membership at issue in this case and that none of the defendants have, at any time, relied upon MERS's Rules of Membership?
A. If I am aware of that, I don't recall that, specifically.
Q. Does that change your opinion about the posture of the case if, indeed, that is true?
A. No.
Q. Are you aware of any Idaho Supreme Court authority standing for the proposition that MERS is a sham beneficiary?
A. I am aware of Idaho state court decisions that discuss that generally.
Q. My question is: Are you aware of any Idaho Supreme Court authority standing for the proposition that MERS is a sham beneficiary?
A. I am aware -- well, I mean, is there an Idaho Supreme Court decision that I am aware of that says that MERS is a sham beneficiary? No.
Q. Are you aware of any decisions from the Ninth Circuit Court of Appeals standing for the proposition that MERS is a sham beneficiary?
A. I may be, but I don't -- I couldn't tell you

one right now.
Q. There may be an opinion from the Ninth Circuit Court of Appeals?
A. If you are asking about whether or not there are decisions that use the word "sham," I don't know. I mean, I may know; but I don't recall.
Q. You refer to MERS, a couple of times in this report, as a "sham beneficiary" or that it may have been a "sham beneficiary."
What I want to find out is what you mean by the term "sham beneficiary."
A. I believe, number one, that there are -- maybe it's -- I mean, there are decisions that talk about MERS's interests as being sham interests or a sham beneficiary. I don't recall, specifically, the wording. Those decisions exist.
Also, really, I mean, I used the word "sham" in this Memorandum in its common usage, in the sense that the Trust Deed Act requires that you identify -- I mean, the way I have described it before in training is that you identify a dog, and the dog that you identify is the dog.
You can't use a duck in place of a dog because the legislature used the term. The beneficiary -- we would have to look at the Trust Deed Statute to get the

wording correctly.
Basically, you can designate a beneficiary. That's the person designated as the person whose interests the trust deed is for. So that's a little bit different than saying, "You get to pick any dog you want, but you have got to still pick a dog."
Q. So it is your expert opinion that designating an entity, whether it is MERS or not, as a nominee beneficiary is inappropriate?
A. I don't know about the term "inappropriate." We can discuss semantics all day long. I mean --
Q. Is it illegal?
A. Is it allowed by the Trust Deed Statute? It doesn't appear to be. The legislature could have allowed that, and they chose to use different words.
Q. Your second discussion here is titled "Improper use of MERS." I will just read this first sentence. It says, "Had an assignment of the trust deed from MERS to an actual beneficiary been executed and recorded, serious questions would still remain about compliance with Idaho Code Section 45-1505 and the clarity of the chain of title."
I guess I will finish by reading the rest of the paragraph.
"Because MERS may have never had an interest in

the trust deed, it may have been merely a sham beneficiary from the start. If so, any assignment of the trust deed from MERS would not have the intended legal effect of transferring beneficiary status. Even if it did, it would be misleading and confusing to the borrower."

If you want to parse that out by sentence, that is fine; but I would like you to elaborate on those opinions a little bit.

A. Okay. So if, as it appears, Idaho Code 45-1505 -- excuse me -- 45-1502, which defines "beneficiary," reads as it naturally reads, to not allow me to create a beneficiary who is not really a beneficiary in any way that any of us would ordinarily use that term -- somebody who doesn't stand to benefit from the transaction, other than in an incidental way, as MERS does, or as I understand MERS does -- then the assignment of the trust deed from a fake, sham, whatever word you use to describe what MERS is, wouldn't seem to be valid either under the Trust Deed Statute.

I mean, the purpose of the Trust Deed Statute appears, from its face at least, in part, to require some transparency on the part of foreclosing entities, whoever they may be.

The purpose of MERS, at least -- well, I don't

know if it is the purpose of MERS.

One indirect result of MERS is to eliminate some of that transparency from the perspective of the borrower, in the sense that the various transfers and the machination -- the way the clock works in the course of a mortgage in its foreclosure is it no longer becomes a matter of record until at least parts of them, theoretically, at least according to the Trust Deed Statute, become visible right at the end when they are supposed to be recorded.

Now, in this case, an assignment that would have conceivably made the case a non-issue, in some respects, was not recorded, which is odd and appears to be a mistake, if not more. That's the first clause of that part.

It is to say, okay, even had we had that assignment in there, at least at the end of the game, to have made this process transparent to the borrower, there still may be a problem here.

The reason why is because the parties were trying to subvert the purpose, one of the apparent purposes of the Trust Deed Statute, by using MERS as this fake beneficiary.

Q. Now, I am sure you have looked at a number of these. They are kind of standard form security

instruments, deeds of trust. In the deed of trust, does the borrower convey any interest to MERS?

A. Well, MERS acts solely as the nominee of the lender. In this trust deed, as in many of them, following that statement, or shortly following it, is the bold statement of something along the lines of, "MERS is the beneficiary of this trust deed."

Then, later on, as I believe, at the very least, is in the Ralph case, MERS is only given the authority to do anything as nominee, as required by law or custom.

So, you know, the trust deed, itself -- the trust deeds that use deeds, themselves -- and I haven't developed an opinion in this case -- certainly could be confusing or misleading, just in the way they are written, for purposes of the Consumer Protection Act.

MR. McGEE: We can pull out the Deed of Trust, if it would help. You have not developed a opinion as to whether a deed of trust instrument facially violates the Idaho Consumer Protection Act.

Let me just pull out the Deed of Trust, and we can actually look at the language.

(Deposition Exhibit No. 5 was marked.)

BY MR. McGEE:

Q. Exhibit 5 is the recorded Deed of Trust wherein Mr. Renshaw was the grantor. I would like you to turn to page 3.

I think, maybe, this is what you are referring to. In the second-to-the-last paragraph there, it provides, "Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclosure and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."

Setting aside the issue of whether this facially violates the Consumer Protection Act, what is your opinion about that language and its meaning in the context of this case?

A. I'm not sure I understand your question.

Q. That was not a very good question. Go ahead and strike that.

I guess, first, I would ask you to look at this idea that MERS holds only legal title to the interests

granted by the borrower in the security instrument.
Now, is it your understanding that the interests granted by the borrower are being granted to a lender and, in the case of conveyance of the actual property, to a trustee?
A. Well, my opinion of it is that the Idaho case law is, itself -- I think it is fair to say that it is, itself, inconsistent on what "legal title" in the context of a trust deed actually means.
To the extent that it is not inconsistent, it is pretty difficult to make it consistent or understand exactly what the purported decisions intend "legal title" to mean, if it means anything.
So with that context, with that background, the idea that MERS holds only legal title to the interests, as used here, certainly, it seems clear in Idaho law that the trustee has the powers granted in the Deed of Trust, in the trust deed.
The trust deed can do what the grantor, what the borrower, has covenanted to allow or agreed to allow the trustee to do.
Now, there is case law, Idaho case law -- it is a Supreme Court decision, I believe; and it is not in a foreclosure context, as I can recall -- that discusses this idea of legal title.

I would have to look at those cases to give you a complete answer, but the bottom line is that my opinion is that this doesn't -- can we say that MERS is allowed to do things necessary to comply with law or custom?
It certainly appears that the parties have agreed to that; but it's unclear, even if it were necessary for MERS to do something, whether MERS could do that under state law.
Q. So is it your understanding that among the interests granted by the borrower are the lender's right to repayment of the loan?
A. It certainly doesn't seem that way, unless there is a particular part that you are referring to.
On an earlier page -- I am pretty sure page 2 is where it identifies MERS as acting solely as a nominee for the lender. Then there is this question about what "nominee" means. In any event --
Q. Well, maybe we can clarify it a little bit. Is it your understanding that there is a difference between legal title and equitable title?
A. Yes.
Q. I know we are getting into kind of legal nuance here and law school stuff, but what is your understanding of the difference between legal title and

equitable title?
A. Well, again, in Idaho, I think that the Idaho Supreme Court, in particular, has made that unclear. Equitable title is, essentially, the right -- well, I mean, I suppose we can be just straightforward about it.
It is the right in equity, in the long run, as opposed to who holds, as a matter of formal law, at that particular time, the right to any property.
Q. If the distinction they are trying to make by referring to "legal title," as opposed to "equitable title," is that -- it may kind of correspond with the identification of MERS solely as nominee.
The idea that MERS would hold only legal title is, arguably, consistent with their designation as a nominee in this case; correct?
A. No. No.
Q. So you draw a distinction between being a nominee and holding only legal title?
A. Yes.
Q. Can you describe what that distinction is?
A. Well, in a very pithy sense, it is the fact that, in this case, MERS has said that it has no interest. At least, it said, if I recall, it had no economic interest.
I mean, MERS, to the extent that it may believe

that it holds legal title, certainly, does not appear to want or gain at all from holding legal title.
Q. It sounds to me like, now, you are equating having legal title with having an economic interest. That sounds, to me, more like equitable title. Is it?
A. No. I mean, MERS has no interest in this, other than the fact that MERS is in business because it believes it can do this, in this document. Otherwise, MERS would not be involved in this transaction.
In the sense that, you know, I have no interest in any of the mortgages of people in this room, in the same way that MERS doesn't either; and I don't think that means that I have legal title to all of the mortgages in this room.
Q. But nobody designated you as a nominee for whoever lent us the money; correct? That is the distinction, and I think that is where the analogy kind of falls apart. Would you agree?
A. I don't believe the analogy falls apart. I mean, no, I haven't been, to my knowledge, designated in any trust deeds of people in this room.
Q. I mean, that is a pretty major distinction, especially in light of the fact that, I mean, these are common form documents; correct?
A. I think it would be a major distinction if the

legislature in Idaho had said, "You can designate any beneficiary you want to." It didn't say that.

Q. Fair enough.

This next section is entitled "Entitlement of foreclosing entity to enforce the note," on page 7. Maybe this is what we were just discussing.

At the end, you state, "An attempt to foreclose, or completed foreclosure, by a person not entitled to enforce the note may be void or voidable, depending on the circumstances.

"Such an attempt or completed foreclosure may also violate other law, such as the federal Fair Debt Collection Practices Act or the Idaho Consumer Protection Act. Were the law otherwise, I could foreclose on homes I have no interest in, over debt I am not owed, with impunity."

Maybe this is what you were just explaining. Can you explain that statement?

A. Yes, I can, although, you know, I would prefer to just refer to the discussion that we had earlier about the difference between the person entitled to enforce and the owner because that is same opinion, basically.

Q. Okay.

A. I mean, I don't think we have discussed the

Fair Debt Collection Practices Act before. That is mentioned here. I don't understand it to be an express claim in this case.

Q. You were talking about the distinction, and I believe you were referring to our discussion about the difference between a holder of a note and an owner of a note or the entitlement to enforce a note versus having an ownership interest.

I am referring, specifically, to this last sentence here that states, "Were the law otherwise, I could foreclose on homes I have no interest in, over debt I am not owed, with impunity."

I mean, do you think that is a little bit of an exaggeration?

A. No, because, if I can foreclose on homes that I have no interest in, and that I am not owed any debt on, without liability, then I can do that with impunity.

Q. We need to back up and figure out where you are coming up with this idea that anybody is maintaining the position that one can foreclose on a home they have no interest in.

A. You asked me earlier, if I recall, whether or not I have an opinion about whether MERS initiated the foreclosure here. I think my answer was that I didn't have an opinion about it and that I don't know.

I think it is arguable that MERS initiated a foreclosure, and they were not owed a debt, and they had no interest in the mortgage.

Q. Again, now, we are returning to the MERS issue, which is appropriate, in light of the fact they are the only defendant remaining.

It is your understanding, at least purportedly, according to the Deed of Trust, other documents, and your understanding of MERS, that MERS acts as a nominee for the lender; right?

A. Yes. That's what the trust deed says.

Q. MERS is, in effect, acting as an agent or a nominee for somebody with an interest in the loan; right?

A. The trust deed uses the term "nominee."

Q. So their actions would be taken as a nominee; correct? Your opinion is based on whether the Trust Deed Act allows a nominee to take those actions; correct?

A. Not entirely. It's not simply a Trust Deed Act issue. It's also a negotiable instrument or a secured transaction question, as well, simply because this is not a mortgage but is a trust deed. It is not an old-style mortgage.

We are dealing with two pieces. That goes back

to the discussion about bifurcation. I am not aware of any place in the case where MERS contends that it was ever entitled to enforce the note.

Q. Fair enough. I will leave it at that.

This next section is entitled "Compliance with covenants in trust deed."

"The trust deed in this case, in particular section 22 of that instrument, includes covenants requiring notice and acts additional to the requirements of Idaho statutes."

I am reading from the opinion, in case that wasn't clear.

"I have not located any notice or other document that appears to comply with the additional notice requirements of section 22 of the trust deed."

Other than my fumbling around with the words there, does that --

A. It sounds like you got the gist of it.

Q. We have Exhibit 5, the Deed of Trust. Let's go ahead and look at Section 22 so I can be clear about what we are talking about here.

Why don't you just tell me? What would you expect to see from a lender in this case to comply with Section 22?

A. Well, it seems that a fair reading of it would

be to require a written notice that included at least six things written clearly so that the borrower could understand them.

That's what "notice" is. Notice has to be understandable by the recipient. It has to specify the default. It has to specify the action required to cure the default.

I think a fair reading of that would mean the complete action and not simply a notice that says, "You owe a certain amount of money," but, "You owe this amount of money, and it has to be paid in this fashion, to this place, and made payable to this person."

It has to set out a date before which the default has to be cured. That date has to be at least thirty days after the notice is given.

It has to specify that, if you don't cure by that date, the failure to do so might result in acceleration of the sums. Conceivably, that may need to be explained to certain recipients of notice.

It has to also specify that the borrower can reinstate even after that deadline.

It has to specify that the borrower can bring a court action over, at least, whether or not a default exists, as well as any other defenses that the borrower might have.

I haven't seen a written notice that includes all of those elements in this case.

Q. Have you been provided all of the notices sent by GMAC Mortgage in this case?

A. I don't know if I have or not.

Q. What notices have you been provided?

A. All of the materials from the discovery and otherwise that I have been provided are on the DVD. If there is something that is not on the DVD, that could change my opinion.

Q. The next section is titled "Careless or fraudulent document preparation."

You refer, in here, to the, "...Appointment of Successor Trustee...executed...by a purported 'Assistant Secretary' of MERS..."

You note that it and the Notice of Default were notarized by the same California notary public. It looks like the suggestion is that, because they were both executed on the same date and notarized by the same notary public, they were part of a high-volume document mill situation.

Is that a fair characterization of that first portion of your opinion?

A. I would say that that is a signal that there might be high-volume document preparation going on.

Q. Does it strike you as unusual that a lender would appoint a successor trustee and then file a Notice of Default on the same day?

A. No, I don't think that's unusual.

Q. Would it be unusual that both documents are notarized by the same notary?

A. From my experience in the last couple of years, that is not unusual.

Q. Now, as I understand it, this high-volume document mill concept that you allude to here -- the problem there is with, basically, folks not fact-checking, basically? I mean, is that a fair characterization? They are just signing away; right?

A. I think it goes beyond simply fact-checking. But, yes, I mean, that is -- the notary statutes in this state and in other places, the requirements for acknowledgements, and the execution of documents by entities rather than individuals seems to have a purpose or a public policy, from its face, just like the Trust Deed Statute seems to have a purpose or a public policy, from its face.

That purpose seems to be undermined by the idea that, because there are so many foreclosures to process, we are going to hire, you know, a bunch of everybody's nephews out of community college and put them in a big

office building and have them sign papers all day.

You know, the idea of the notary statutes, the acknowledgement statutes, and the statutes in this state and other states that govern how entities execute documents didn't seem to contemplate this.

We want to make sure that the entity is conducting due diligence and that, actually, this document is being executed on behalf of the entity.

In some situations -- this case may be one -- it is impossible to tell, with the amount of discovery -- I don't know if it is impossible to tell. We can certainly identify the circumstantial evidence of high-volume document preparation in this case.

If further discovery were conducted, it could determine that the person who signed this document, conceivably, couldn't even read it.

That seems to, probably, violate the notary statutes or, at least, other statutes in California or elsewhere, wherever this was signed, that would govern the preparation of these documents.

Q. In this particular case, the Notice of Default, for example, sets forth the default, the nature of the breach of the Deed of Trust; correct? That is among the purposes of sending out a Notice of Default; correct?

A. Yes.

Q. Is there any evidence that you are aware of that those statements are not true?
A. The statements in the Notice of Default?
Q. Yes.
A. Yes.
Q. What is that evidence?
A. We discussed it earlier. I mean, for one thing, the Notice of Default may give to the ordinary reader the impression that MERS has an interest in this loan and is entitled to be paid for it.
Q. If somebody pays MERS, do you know what happens? Does MERS keep the money?
A. Conceivably, it could.
Q. Do you know if they enter into agreements with their members about what they do if they do receive money?
A. I may be aware. I don't recall right now. I mean, I may have seen those. I don't remember anything, specifically, about what happens to the money. I may have read it somewhere.
Q. Do you imagine they have a contractual obligation to turn the money over, should payment be made by a borrower?
A. They may.
Q. You also refer to another example, the

Affidavits of Mailing dated August 27th. I will quote from your Memorandum.

"As another example, the Affidavits of Mailing are dated August 27, 2010, and signed by an affiant claiming to have personally mailed certain documents on August 27, 2010, yet they were not notarized until more than two weeks later, on September 14, 2010."

Just so I am clear, is it your position that the affiant -- or affiant -- however you want to say it -- signed the documents on August 27th or personally mailed the documents on August 27th?

A. If I recall correctly, the document states that the affiant mailed the documents on August 27th. Presumably -- let's hope -- they were signed on September 14th, in the presence of the notary on September 14th.

And if that was the only thing this particular person mailed lately, then I suppose that that's probably not a big problem.

My guess, I think, given the circumstances of the case, is that this affiant probably mailed hundreds, if not thousands, of letters in between August 27th and September 14th and probably did not have personal knowledge on September 14th as to whether or not he or she mailed this particular piece on August 27th.

Q. Do you think they maintain business records associated with their activities on a particular loan or a case?
A. I would hope they would. The affidavit does not indicate that they have a record of mailing it. If I recall correctly, the affidavit says, "I mailed this," which I think is a different statement, when you are under oath, than saying, "I have a record of mailing this."
Q. I am turning to "Due Care," the section titled "Due Care." It provides, as follows:

"Both individually and cumulatively, the practices in this foreclosure that I have identified above make it appear that the foreclosing entities' concern for their obligation to exercise due care and to comply with laws governing foreclosure and instrument preparation was lackadaisical at best.

"Given the gravity of the matter involved -- a person's home -- it is reasonable to require meaningful compliance with those obligations, and it would be unreasonable to permit shortcuts under basic statutory and common law requirements."

Why don't we narrow this just to MERS? We may have talked about this a little bit before. Will you identify for me kind of the nature of MERS's obligation

to exercise due care and comply with the laws governing foreclosure?
A. Well, if MERS is going to be involved, then they owe the same standard of due care that we all owe.
Q. I will represent to you that the only document or indication of MERS's involvement -- well, the only document executed by MERS was the Appointment of Successor Trustee.

In the context of this case, I am trying to narrow down where the various duties lie because, as you know, there are other entities involved.

I want to figure out what MERS's was in the context of the initiation of this foreclosure. By "initiation of foreclosure," I mean from execution of the Notice of Default and moving forward. From there, what are MERS's responsibilities?
A. Well, for one thing, I mean, you are probably right that that was the only document that MERS claims to have executed.

If it believes, as it seems to argue, that it is the beneficiary of the Deed of Trust, then it omitted assigning the Deed of Trust to the actual beneficiary, as required by the Trust Deed Statute, at the time of foreclosure.

And that may be -- I'm not sure, but that may

be the most egregious one because of how simple it would have been for MERS to have done that. In fact, now, MERS requires it of its members.

So if MERS was the beneficiary, as it claims, unless it was intending on being the foreclosing entity, which I don't believe that it is, or that it was, then it would have executed an assignment of that trust deed.

The duty to do that is not just one of due care but it is a statutory duty, as well, set out by the Trust Deed Act.

Q. So it sounds to me like MERS owed a duty to Mr. Renshaw and, perhaps, the public at large, in light of the recording requirement, to assign the Deed of Trust to the person entitled to receive payment?

A. Yes. That is one thing. That is, of course, given your questions earlier, even assuming that MERS could do that.

If it couldn't do that, based on the reference to MERS in the trust deed, it has a duty of due care to not do that.

So one way or the other, MERS can't have its cake and eat it, too, if you will. It can't be the beneficiary and not assign, in the event of a foreclosure, or not have to do that and then, also, be the beneficiary, if that makes sense.

Q. There are a couple of things I wanted to address. You mentioned that MERS requires an assignment to the person entitled to enforce the note. I think you used the phrase that it requires its members to take some action; correct?

A. Yes. That's my summary understanding of the membership rules MERS put in place after this, after this foreclosure was commenced.

Q. That MERS required its members to do something?

A. On its behalf.

Q. You mentioned this concept that MERS may not even be able to assign the Deed of Trust. I am curious. In your expert opinion, what does that mean? For the millions of deeds of trust where MERS is designated as a beneficiary nominee for the lender, what does that mean?

A. Well, I mean, I can only speculate. Several courts have speculated. I mean, it seems as though there is a bet, a contemplated bet, that this MERS system actually is legal.

It doesn't work. It's MERS and its members that -- I think justice will probably have to absorb that cost.

Q. I am speaking more as a practical matter. If MERS can't assign the Deed of Trust and they can't foreclose the Deed of Trust but they are there as the

beneficiary on all of these deeds of trust, what does that mean for the millions of loans?

Are they all just entirely unenforceable; or do lenders that hold the note have to actually go out and, basically, prosecute a cause of action on the note, itself, and get a judicial lien? How does that, as a practical matter, work out?

A. It probably varies by state. I haven't developed an opinion as to what -- essentially, you are asking me to advise your client, it sounds like, what would happen if they lose this case.

You know, essentially, as far as the duty of due care, the duty of due care is the same as it has always been.

Whatever MERS would need to do to undo the fact that it has confused and misled and subverted the purposes of the Trust Deed Act, it would have to do those things. I am not sure how much that would cost or what they would be.

Q. I have one more document to go through. Do you want to take another short break? Do you want to break for lunch?

A. How much longer do you think you have?

Q. I don't know. Maybe a half hour.

A. I would prefer to just keep going.

(Deposition Exhibit No. 6 was marked.)

BY MR. McGEE:

Q. Exhibit 6 is what appears to be a number of e-mail communications between yourself and Mr. Steele. It was on the DVD you provided earlier in the deposition.

I just want to go over a couple of things. First, turning to, I guess, the third page in, there is, I guess -- about three-quarters of the way down the page, there is, in brackets, "[Quoted text hidden]." Do you see that?

A. Yes.

Q. What is that?

A. I am 99-percent sure that is going to be the text that is -- and I apologize for that. That's just a feature of the e-mail system. That is going to be the text that you see above that the e-mail system has just suppressed, in the interest of brevity.

Does that make sense?

Q. Well, turn a couple more pages. You have a couple more "[Quoted text hidden]" on a blank page. I think that represents the end of this e-mail chain.

A. Uh-huh.

Q. I think I am understanding what is going on. It is intuitive, for me, when I look at these, to think

of the top e-mail as the most recent. It looks like, the way this is set forth, the top e-mail was actually the first e-mail.

A. It is the first e-mail. The next one, which was a reply to my own e-mail, would have quoted that. You know, if you want me to forward you the actual e-mails --

Q. No. No. No. I just want to make sure that we have everything here. That makes sense to me. So you understand, I have seen a lot of e-mail printouts where it has the most current one at the top; and then it has all of the text below it.

It looks like, the way this printed off, it went the way you would hope it would go, actually. It actually works out better this way. I just wanted to make sure that was the case.

A. If there is any portion of these e-mails where you are concerned you might not have the whole e-mail, just identify it. I can forward you the whole e-mail, and you can inspect it.

Q. I appreciate it.

Now, turn another -- I don't know -- six pages in.

A. Can you describe the --

Q. The top says, "Renshaw v. MERS, Homecomings and

Executive Trustee Services." The date at the top, right is Friday, April 13, 2012, at 3:55 p.m.

A. Yes.

Q. Do you recall whether, at this time, Mr. Steele and you had discussed your being an expert in this case?

A. I don't recall.

Q. In the top e-mail, here, from Jon Steele to you, the second paragraph reads:

"I could use any Idaho district court decisions you have that involves MERS, Homecomings, or Executive Trustee Services as defendants. Especially if Moffatt Thomas represents a defendant. I would like to show a pattern of behavior and the actual knowledge of these defendants and/or their attorneys that they are continually violating the law."

What do you think Mr. Steele was looking for there?

A. I don't know.

Q. He referred to, "...a pattern of behavior and actual knowledge of these defendants and/or their attorneys..."

A. Well, certainly, I think that there are a lot of MERS cases, as you probably know. As to what Mr. Steele wanted, I don't know.

Q. Why do you think he specifically called out

Moffatt Thomas there?

A. I don't know.

Q. It looks like your response on April 10th says:

"Jon -- I read the brief. Is Homecomings the entity trying to foreclose?"

Is this "YES" next to that something you entered, or was that Mr. Steele that entered that?

A. This e-mail that you are reading from was not my response to the April 13th e-mail. I believe that was my e-mail to Mr. Steele on April 10th to which he replied on April 13th.

Q. So this is set up differently than the last one?

A. This is where the quoted text is not hidden, for whatever reason. I'm not sure why.

Q. All right. So you asked whether Homecomings is the entity trying to foreclose. Did you enter that "YES" next to that, or is that something that Mr. Steele entered?

A. I believe it's something Mr. Steele entered.

Q. These are your questions and his responses that he entered in the context of the attached e-mail?

A. That is my best recollection.

Q. You asked whether you read it right that Homecomings has admitted it is not the current holder of

the note and is not in possession of it; and he responded, "YES."

Did you rely on both of Mr. Steele's answers in forming your opinions today?

A. Not for my opinions.

Q. No?

A. No.

Q. Is it your understanding that Homecomings is the entity trying to foreclose?

A. It is certainly unclear, as we discussed earlier.

Q. Have you reviewed MERS's milestones or any MERS's reports for this loan?

A. Yes.

Q. Did those indicate whether Homecomings was the servicer on this loan?

A. If I recall correctly, Homecomings ended its involvement, to the extent that MERS knew about it, early on in the loan.

I'm not so sure that the -- in fact, I am sure that the documents following that period that were available publicly -- some of those, at least that I have seen, that were available to Mr. Renshaw do not make it clear whether Homecomings is still involved or not.

Q. A couple of pages later -- I am starting to lose track of where the strings begin and end -- it looks like it is an e-mail from you to Jon Steele. It is dated Friday, July 1, 2011, at 2:34 p.m.
A. Yes.
Q. In the second sentence, you stated:
"I've also already put an email out for some stellar HAMP private right of action and MERS briefs to a select group of folks around the country who I know have done good work on these HAMP cases."
Do you recall this e-mail?
A. Well, I certainly see it; but I don't recall the circumstances of it.
Q. Is it your understanding that there was a HAMP cause of action in this case at one point?
A. Yes, I think there was. I seem to recall that there was.
Q. And have you been advised as to whether there remains a HAMP cause of action in this case?
A. It is my understanding that that claim was dismissed.
Q. We may have discussed this. Again, you are not offering any expert opinion on HAMP or loan modification, are you?
A. Not unless somebody in the case asks me about

it.
Q. Go in a couple more pages. It looks like it is also dated July 1st, 6:48 a.m.
Well, before we leave that question, when you put out an e-mail, were you searching for briefs about HAMP private causes of action or authority to provide to Mr. Steele? What do you think that e-mail was about?
A. I can't recall it, but it was probably about what is described there.
Q. Do you recall whether you received anything in response to that e-mail?
A. I don't remember.
Q. Now, go back to this e-mail, 6:48 a.m., July 1st. It is an e-mail from Jon Steele to yourself. Mr. Steele indicates that Judge Williamson heard the defendant's motion to dismiss on the pleadings, and she had three questions.
The three questions were:
1. What effect that MERS is simply referred to in the Deed of Trust and not a signatory;
2. Recent case law on MERS as the beneficiary; and
3. Does HAMP create a private cause of action?
Do you recall whether you had authority -- or whether you provided any documents to Mr. Steele in

response to this request?
A. I can't recall, although I can tell you that there were a couple of e-mails where I provided briefs or decisions or articles or otherwise. They are in here. Any time there is an attachment, it is included on the DVD.
Q. Yes. I think we saw that.
A. If I did, you should have it. If you get a feeling that you don't, just let me know.
Q. Sure.
A couple more lines down, it says, "I think I have Judge Williams' ear." I assume that is supposed to be "Judge Williamson's."
"This could be the Idaho test case."
Do you have any inkling as to what he meant by "the Idaho test case"?
A. I imagine, as many people thought that the Trotter case would be the case, that we would get an Idaho decision about MERS and, possibly, HAMP -- an Idaho State court decision.
Q. So you interpreted this to mean this could be a test case for challenging MERS's business model and how MERS does business?
A. I'm not sure how Mr. Steele used it. As I understood it -- I probably understood it to mean this

could be a case where we have a judicial decision that is published about these issues.
Q. In your opinion, does this case provide a good opportunity for a sound judicial opinion as to the validity of MERS?
A. I don't think I have an opinion about that.
Q. On the very next page, there is an e-mail to Mr. Steele and somebody named Kahle Becker.
A. Kahle Becker.
Q. Kahle Becker? Who is that?
A. That is another attorney that I know.
Q. Is it somebody dealing with similar issues for a client?
A. I can't recall if Mr. Becker has foreclosure cases or not.
Q. So you do not know why you would have included him on this?
A. I think Mr. Becker had introduced me to Mr. Steele.
Q. The e-mail refers to a Georgia jury award on a RESPA case. Obviously, I haven't had a chance to look over the materials you provided. Do you recall anything specific about this case?
A. The only thing that I can recall is that I believe the plaintiff in that case may have been a

Veteran. Other than what is written, I don't remember anything specific about that case.
Q. What does RESPA apply to? What is RESPA about?
A. It's a federal law that governs certain real estate transactions.
Q. Would it apply to MERS?
A. Conceivably. I haven't thought about that.
Q. Another seven or eight pages in is an e-mail dated Thursday, May 10, 2012, at 8:15 a.m.
A. Yes.
Q. Near the bottom there, it is from you to Mr. Steele. It states: "My apologies, but I neglected to include an important section of the report. I've attached a revised report."
On the DVD, did you provide earlier drafts of your report?
A. I wanted to, but I don't have them. The reason I sent this e-mail -- this is something that may have even happened to you. When you save -- I was working from a Microsoft Word document.
I published it to a PDF to share with Mr. Steele. When I published it, it was later that I added -- and I can remember specifically which portion I added -- the small portion on "Duty of Care."

When I pulled up the PDF, I noticed that that didn't get put in the PDF. So I published the document again, and that would have been the second report that was sent.
Q. In other words, your first draft of the report was identical, except it didn't have the "Duty of Care" section?
A. Yes. In the first PDF, the "Duty of Care" section didn't get published to it. I published it to PDF before I put in the "Duty of Care" section. I had forgotten that I had not put it in the PDF.
Q. Do you have any other drafts of your opinion, or is that it?
A. No. I think these came -- let's see -- within forty-five minutes of each other. If I had them, I would have put them on the DVD.
Q. Getting pretty close to the end of the document, there is another e-mail from Friday, July 1, 2011, at 2:44 p.m. It is about -- I don't know -- ten pages from the end.
A. What time of day?
Q. 2:44 p.m.
A. I have it.
Q. You refer to a depo excerpt of one of MERS's "Vice Presidents." You have "Vice Presidents" in

quotes. I assume this depo excerpt is attached and is part of the DVD.
When you are referring to "Vice Presidents," in quotes there, is that a reference to this concept that employees of MERS's members are signing documents as "Vice Presidents" or "Assistant Secretaries"?
A. Yes, in part. It may be -- I don't recall. That should be on the DVD. It's the document that is referred to on the next page, "73 Notice of Filing of Supplemental Exhibit..."
My best recollection seems to be that there is a lengthy discussion about what a MERS "Vice President" is in that deposition.
Q. Go a couple of pages down the line to Tuesday, July 5th, at 11:23. It is from you to Mr. Steele. It states that you went over the briefs and that you made a few notes.
Would you have provided those notes to us?
A. No. I don't think that I have them anymore. They would have been handwritten notes, and I don't think I retained that file.
Q. You may have just gone over them orally with Mr. Steele on a telephone call or something?
A. Telephone or in person.
Q. The next page says, "Main two things are:

"You are probably going to lose on the HAMP private right of action issue. I don't think anybody's winning that."
Then you have attached some more stuff on MERS, I guess.
A. That's all on the DVD. Those attachments, in particular, are on a zip file. I think it's the only zip file on the DVD.
Q. That is a library of information that you collected about MERS?
A. Yes.
Q. Go back a few more pages. The date of the e-mail is Monday, August 15, 2011, at 12:12 p.m. The actual text is on the following page. It looks like this is referring to a decision on the motion to dismiss or the motion for judgment on the pleadings.
Mr. Steele indicates that he wanted to get together with you on a strategy. Did you review that memorandum decision on the motion for judgment on the pleadings, as you recall?
A. I did, at some point. I can't remember if it was shortly after getting this or not.
Q. Did you ever get together on a strategy?
A. I can't remember if we did.
Q. Do you recall any conversations about

litigation strategy?
A. The only one I recall would have been long before this, and that was the one we described when you asked me questions about it earlier.
Q. Generally speaking, what was the litigation strategy?
A. I think I just gave some -- this was the conversation where I can't remember if their Complaint was drafted already or not.
I think I might have given -- it wouldn't have been -- I don't believe it would have been any discussions of "do this" or "don't do that" but my opinion about whether certain claims were good claims or there might be better claims to bring.
Q. Did you suggest that any of the claims that he actually brought were not good claims to bring?
A. You have seen the e-mail about the HAMP private right of action; but I think the opinion on that probably changed because that case law was still in flux at the beginning of this case, I think.
Q. Earlier in your deposition, when you were talking about the Notice of Default, you suggested that a competent real estate lawyer might read it differently. Was that to suggest that you are not a competent real estate lawyer?

A. No. No. That was to suggest that -- when we were talking about notice, there is some notice that is appropriate if you are sending notice to an attorney.
In particular, if you knew you were sending notice to a real estate attorney, you might be able to speak in jargon and speak in legalese, for lack of a better term, as opposed to when you send notice to somebody who is not law-trained.
That was in the context of your question about whether or not Homecomings Financial -- how Homecomings Financial is referred to in that case.
I think it would probably require, certainly, law training, in most cases, if not real estate law training, to understand the frame of reference for Homecomings Financial in that document.
Q. So you do consider yourself to be a competent real estate attorney or real estate lawyer?
A. In foreclosure law, yes.
MR. McGEE: I don't think I have anything further.
Mr. Steele?
MR. STEELE: I think it is about 1:00 o'clock. We started about 9:00; is that right?
MR. McGEE: That sounds right.
MR. STEELE: So that is four hours at 250 bucks an hour. Is that your understanding?
MR. McGEE: That is what you told me before the deposition, $250 an hour.
Is that correct, Mr. Eppink?
THE WITNESS: That was my understanding, as well.
MR. STEELE: Thanks, Matt. That is all I have.
THE WITNESS: Let me just say, while we are on the record, again, if you find that there are documents referred to in these e-mails or otherwise that you feel should have been on the DVD but weren't included, feel free to contact me or Mr. Steele.
MR. McGEE: Sure. Thanks.
(The foregoing deposition concluded at 12:53 p.m.)
(Signature requested.)
* * *

CERTIFICATE

I, LORI A. PULSIFER, Certified Shorthand Reporter, do hereby certify that:
The foregoing proceedings were taken before me, at which time the witness was placed under oath;
The testimony and all objections made were recorded stenographically by me and were thereafter transcribed by me;
The foregoing is a true and correct record, to the best of my skill and ability;
Pursuant to request, notification was provided that the deposition is available for review and signature; and
I am not a relative or an employee of any attorney, nor am I financially interested in the action.
I have hereunto set my hand and seal this 22nd day of June 2012.

/s/ Lori A. Pulsifer

LORI A. PULSIFER, CSR, RDR, CRR
Idaho CSR No. 354

State Farm

State Farm Mutual Automobile Insurance Company

August 16, 2012

Jon M. Steele
Runft & Steele Law Offices
1020 W. Main St. Ste. 400
Boise ID 83702

Pacific Northwest Auto Claims
P. O. Box 52299
Phoenix AZ 85072-2299
208 377 7533 Fax 877 449 5794

RE: Claim Number: 12-0786-255
Insured: Phong Vo
Date of Loss: June 26, 2010
Your Client: Nguyet Vo

Dear Mr. Steele:

I have reviewed your letter of June 25, 2012, directed to our Medical Payments department.

This policy also includes Underinsured Motor Vehicle Coverage with limits of $25,000 per person and $50,000 per occurrence.

I am enclosing a Proof of Loss form which should be completed and submitted to us when your client is ready to settle her claim for benefits. Complete information about all applicable items on the Proof of Loss should be furnished on or as an attachment to the form, except that you do not need to resubmit information that has already been provided to us during our review of the claim. Please state on the Proof of Loss Form if the requested information has already been provided to us.

We hope the proof of loss form will assist you in identifying and organizing many of the items of information necessary to process your claim. Of course, if you need assistance or have any questions about this form, please call me.

I also want to remind you that your policy provides that two questions must be decided by agreement between Ms. Vo and State Farm(R):

1. Is the insured legally entitled to collect compensatory damages from the owner or driver of an underinsured motor vehicle?

2. And if so, in what amount?

If for some reason we cannot agree upon one or both of these questions, the policy states how the disagreement is to be resolved. Legal action may not be brought against us until there has been full compliance with all applicable provisions of the policy.

At this time, we ask that you provide us with confirmation of the tortfeasor's liability limits, along with a completed Proof of Loss, so that we can evaluate any potential Underinsured Motor Vehicle Coverage claim for which your client ***may*** be eligible.

Please feel free to call me if you have any questions or wish to discuss the claim further.

Sincerely,

Pam Graham
Claim Representative
State Farm Mutual Automobile Insurance Company

Enclosure: Proof of Loss form

/pg

Proof of Loss for Uninsured or Underinsured Motor Vehicle Coverage Benefits

Policyholder **Phong VO** Claim Number **12-0786-255**

Policy Number _____ Date of Accident **06/26/2010**

If you need additional space to provide complete information, please attach additional pages.

Name of Injured Person _____

Address _____ Occupation _____

Name of Employer _____

Address of Employer _____

Description of all injuries resulting from this accident _____

Name, address, and dates of treatment of each physician or other care provider who has treated you for any injury resulting from this accident.

1. _____ From _____ to _____

2. _____ From _____ to _____

3. _____ From _____ to _____

4. _____ From _____ to _____

Note: Please attach to this Proof of Loss copies of all medical records pertaining to any injury resulting from the accident or to treatment of any injury resulting from this accident.

Has your medical treatment been completed? ☐ Yes ☐ No If No, please list the care provider from whom you are receiving treatment of any injury resulting from this accident. _____

Please describe any anticipated future medical treatment of any injury resulting from this accident. _____

If you know, please state the estimated cost of such anticipated future medical treatment. _____

List medical bills for all treatments of injuries resulting from this accident (**Note: please also attach copies of bills, if available**)

Name of care provider _____

	Amount
Ambulance or paramedic (if applicable)	
_____	$ _____
Emergency room (if applicable)	
_____	$ _____
Others	
_____	$ _____
_____	$ _____
_____	$ _____

Have you lost any wages or other income as a result of this accident? ☐ Yes ☐ No If Yes, please state the amount and describe the source and type of income lost. _____

Please provide the name and address of your employer or supervisor who can verify this information. _____

Have you returned to work at this time? ☐ Yes ☐ No If No, when do you expect to return? _____

Description and amount of any other item of special or out-of-pocket damage you have suffered as a result of bodily injury caused by this accident:

Description	Amount
_____	$ _____
_____	$ _____
_____	$ _____
_____	$ _____

Have you received payment from any source for bodily injury resulting from the accident or for any item of medical expense, lost income, or other damage, whether or not listed above? ☐ Yes ☐ No If Yes, please state the source, date, and amount of payment.

Source	Date of Payment	Amount
_____	_____	$ _____
_____	_____	$ _____
_____	_____	$ _____
_____	_____	$ _____

Have you ever had a previous injury or condition similar to or related to any injury resulting from this accident? ☐ Yes ☐ No
If Yes, please describe the injury or condition and provide the name of the treating physician or care provider and the approximate dates of your treatment. _____

_____

_____

Have you suffered new bodily injury (or aggravated bodily injury that you relate to this accident) in any other accident or incident that has occurred since the date of the accident? ☐ Yes ☐ No If Yes, please indicate the date, place, and nature of each occurrence, and describe the injury or aggravation suffered therein. _____

_____

_____

If you are prepared at this time to consider the settlement of your claim for uninsured and/or underinsured motor vehicle coverage benefits, including all special and general damages for bodily injury, that relate to this accident, please state the amount that you would be willing to accept in full settlement of your claim. $ _____

Your claim may require further investigation by State Farm®, including but not limited to the acquisition of additional records or your examination by physicians chosen and paid by State Farm. If further investigation is necessary, your claim representative will contact you.

NOTE: Any person who knowingly, and with intent to injure, defraud, or deceive any insurance company, files a statement of claim containing any false, incomplete, or misleading information, may be guilty of a felony and subject to criminal and civil penalties.

I have read the foregoing Proof of Loss and certify that the information and statement contained in it are true, complete, and correct.

Policyholder _____ Date _____
Signature

Address _____

Subscribed and sworn to before me this _____ day of _____, (Year) _____

in _____, _____ County, _____

Notary Public _____ My Commission Expires _____

Michael O. Roe, ISB No. 4490
Matthew J. McGee, ISB No. 7979
MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
mor@moffatt.com
mjm@moffatt.com
23641.0009

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual,

Plaintiff,

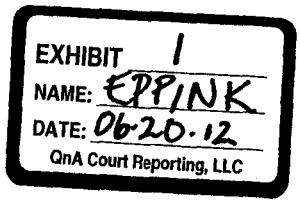
vs.

HOMECOMINGS FINANCIAL, LLC, a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware Limited Liability Company; DOES I-V, and ABC CORPORATIONS I-V,

Defendants.

Case No. CV OC 1023898

NOTICE OF DEPOSITION DUCES TECUM TO RICHARD EPPINK



PLEASE TAKE NOTICE that Defendant Mortgage Electronic Registration Systems, Inc., will take the testimony upon oral examination of **RICHARD EPPINK**, before an officer authorized to administer oaths on **Wednesday, June 20, 2012**, commencing at **9:00 a.m.**, at the offices of **MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED**, located at

101 S. Capitol Boulevard, 10th Floor, Boise, Idaho 83702, and continuing thereafter from day to day until completed, at which time and place you are notified to appear and take such part in the examination as you may deem proper.

To the extent not already produced three (3) days prior to the deposition, deponent is requested to bring with him to the deposition any and all documents, records, or correspondence, in the care, custody, possession, or control of the deponent, as follows:

1. Any and all Documents, Records or Electronic Data in your care, custody, possession or control relating in any way to the above-referenced litigation and any and all of the parties to the litigation.

2. Any and all Documents, Records or Electronic Data authored or received by you concerning this action, including, without limitation, all expert witness reports, opinions, outlines, papers or complete statements of all opinions to be expressed, and the basis and reasons therefore.

3. Any and all Documents, Records or Electronic Data which constitute your entire and complete file for purposes of testifying as an expert witness in this action or pertain to the above-captioned litigation, regardless of source.

4. Any and all Documents, Records or Electronic Data upon which your opinions in this case is based or upon which you relied in analyzing the issues or forming an opinion in this case.

5. Any and all Documents, Records or Electronic Data containing any factual information upon which your opinions in this case are based.

6. All literature or other authoritative material you have reviewed concerning issues in this action.

7. Any and all Documents, Records or Electronic Data reviewed by you in preparation for offering expert opinions and testimony in this case.

8. A list of all cases in which you have been retained or consulted as an expert or percipient witness within the last four (4) years.

9. Copies of all depositions and transcriptions of trial testimony given by you within the past four (4) years.

10. Any and all Documents, Records or Electronic Data reflecting the name and address of any attorney involved in a case in which you have testified under oath as an expert witness.

11. A complete and up-to-date curriculum vitae outlining education institutions you have attended, degrees and certifications you have received, your memberships in professional organizations, honors you have been awarded, and a description of your experience and training within your field of expertise.

12. A bibliography listing all of your published or unpublished writings and professional meetings addressed, together with copies of all of your publications for the past ten (10) years.

13. Any and all Documents, Records or Electronic Data which evidence the total amount of money you have been paid or billed for your work as an expert and/or consultant by any party or counsel to this litigation.

14. Any and all Documents, Records or Electronic Data evidencing or reporting your time and expense records relative to this litigation, including, without limitation, invoices, receipts, bills or other documents which reflect total billings generated by you for this litigation.

DEFINITIONS

1. The terms "Document(s)" and "Record(s)" shall have the full meaning ascribed to them in Rule 34(a) of the Idaho Rules of Civil Procedure, and shall include every writing or record of every type and description including, without limitation shall mean the original, all copies and drafts of papers and writings of every kind, description and form, and all mechanical, magnetic media and electronic recordings, records and data of every kind, description and form, and all photographs of every kind, and including, without limiting the generality of the foregoing, the following: correspondence, notes, memoranda, agendas, minutes, reports, notebooks, binders, drawings, studies, analyses, drafts, diaries, intra-or inter-office communications, memoranda, electronic mail, reports, canceled checks, minutes, bulletins, circulars, pamphlets, telegrams, typewritten and handwritten notes, letters, telegrams, instructions, work assignments, working papers, messages (including reports, notes and memoranda of telephone conversations and conferences), telephone statements, calendar and diary entries, desk calendars, appointment books, job or transaction files, books of account, ledgers, bank statements, promissory notes, invoices, charge slips, accountants' work papers, lab books, lab notes, lab journals or notebooks, evaluation or appraisal reports, pleadings, transcripts of testimony or other documents filed or prepared in connection with any court or agency or other proceeding, deeds, mortgages, deeds of trust, contracts, agreements, assignments, instruments, charges, opinions, official statements, prospectuses, balance sheets, business plans, financial statements, quarterly reports, profit and loss statements, appraisals, feasibility studies, trust, releases of claims, charters, certificates, licenses, leases, invoices, computer printouts or programs, summaries, audio, video or sound recordings, cassette tapes, video recorded, electronic or laser recorded, or photographed information. Documents shall also include all

attachments, enclosures and other documents that are attached to, relate to or refer to such documents.

2. "Electronic Data" means any information created, stored, or best utilized with computer technology of any type, which includes, but is not limited to computer data; word-processing documents; spreadsheets; presentation documents; graphics; animations; images; e mail (including attachments); instant messages (including attachments); audio, video, and audiovisual recordings; voicemail stored on databases; networks; computers and computer systems; servers; archives; backup or disaster recovery systems; discs, CDs, diskettes, drives, tapes, cartridges and other storage media; printers; the Internet; personal digital assistants; handheld wireless devices; cellular telephones; pagers; fax machines; and voicemail systems.

3. "Relating to" means concerning, dealing with, regarding, mentioning, involving, referring to, describing, recounting, reporting, appertaining to, pertaining to, or alluding to; the words "relate to" mean concern, deal with, regard, mention, involve, refer to, describe, recount, report, appertain, pertain to, or allude to.

4. For purposes of interpreting or construing the scope of these requests, the terms shall be given their most expansive and inclusive interpretation unless otherwise specifically limited by the language of an individual topic. This includes, without limitation, the following:

(a) Construing "and" as well as "or" in the disjunctive or conjunctive as necessary to make the request more inclusive;

(b) Construing the singular form of the word to include the plural and the plural form to include the singular;

(c) Construing the present tense of a verb to include the past tense and vice versa;

(d) Construing the masculine to include the feminine and vice versa; and

(e) Construing the term "including" to mean including but not limited to.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure.

DATED this 14th day of June, 2012.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

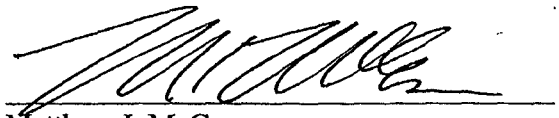
By _____
Matthew J. McGee – Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of June, 2012, I caused a true and correct copy of the foregoing **NOTICE OF DEPOSITION DUCES TECUM TO RICHARD EPPINK** to be served by the method indicated below, and addressed to the following:

Jon M. Steele
RUNFT & STEELE LAW OFFICES
1020 W. Main Street, Suite 400
Boise, ID 83702
Fax: (208) 343-3246
Attorneys for Plaintiff

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(x) Facsimile



Matthew J. McGee

Michael O. Roe, ISB No. 4490
Matthew J. McGee, ISB No. 7979
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Telephone (208) 345-2000
Facsimile (208) 385-5384
mor@moffatt.com
mjm@moffatt.com
23641.0009

Attorneys for Defendants

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual,

Plaintiff,

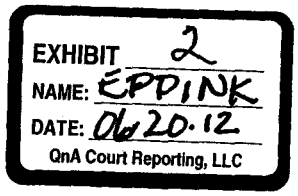
vs.

HOMECOMINGS FINANCIAL, LLC, a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware Limited Liability Company; DOES I-V, and ABC CORPORATIONS I-V,

Defendants.

Case No. CV OC 1023898

DEFENDANTS' EXPERT WITNESS DISCLOSURE



COME NOW Defendants Homecomings Financial, LLC, Mortgage Electronic Registration Systems, Inc., and Executive Trustee Services, LLC, by and through undersigned

counsel, pursuant to Rule 26(b)(4) of the Idaho Rules of Civil Procedure and the Court's February 3, 2012 Scheduling Order, and hereby discloses the identity and expected testimony of the expert witnesses that Defendants will have testify at trial. Defendants reserve the right to supplement this disclosure for rebuttal purposes, or if new information is discovered, or for other good cause.

PRELIMINARY STATEMENT

Discovery in this matter is ongoing. Defendants therefore reserve the right to supplement the following disclosures in light of any additional opinions or other evidence Plaintiff may later seek to offer, or if other information is provided via supplementation, deposition, or further investigation by any party. In light of the foregoing, and in a good faith effort to comply with the Court's scheduling order, Defendants submit the following disclosures based upon the information that has been provided to date. Defendants reserve the right to call and/or elicit expert opinion testimony from any person identified as an expert witness by Plaintiff. Finally, Defendants reserve the right **not** to call any or all of the persons enumerated below, and the right not to elicit some or all of the expert opinion testimony disclosed for the following individuals:

EXPERT WITNESS

Steven C. Hardesty
Perkins Coie, LLP
1111 West Jefferson Street, Suite 500
Boise, Idaho 83702

A. Subject Matter of Testimony.

1. Duty, breach, causation and damages related to the alleged negligence in the commencement of foreclosure of the Plaintiff's loan.

2. The opinions and legal conclusions of Richard M. Kahn, Plaintiff's disclosed expert witness.

3. The opinions and legal conclusions of Heidi Emery, Plaintiff's disclosed expert witness.

B. Underlying Facts or Data.

Mr. Hardesty is an Idaho licensed attorney and has practiced law in the areas of real estate and real estate transactions, banking law and title insurance for approximately 25 years. He will rely upon his education, training and experience in these fields. In addition to his education, training and experience, it is anticipated that Mr. Hardesty's oral deposition may be taken in this case, and his expert opinion testimony may address any and all subjects covered in any such deposition.

In addition to his education, training and experience, it is anticipated that Mr. Hardesty will rely upon his review of the following:

1. The Amended Complaint, Defendants' Answer, and the Summary Judgment papers filed by both Plaintiff and Defendants.

2. The Plaintiff's Expert Witness Disclosure, dated March 12, 2012.

3. Judicial opinions and decisions issued by courts in Idaho, and throughout the Ninth Circuit, interpreting the Idaho Trust Deed Act, MERS's authority to act, securitization, "note bifurcation," the enforceability of trust deeds naming MERS as beneficiary, and the duties and obligations of trustees during non-judicial foreclosure.

4. The Interest-Only Period Adjustable Rate Note executed by Plaintiff and dated June 27, 2007, and all indorsements and allonges thereto.

5. The Deed of Trust executed by Plaintiff and recorded on July 3, 2007.

6. The MERS Rules of Membership effective in 2010.

7. Any testimony, in deposition or at trial, of Ms. Emery or Mr. Kahn.

8. Any new information disclosed by Ms. Emery or Mr. Kahn.

C. Substance of Opinions

Mr. Hardesty is a licensed Idaho attorney with substantial experience in real estate transactions, secured lending, and title issues, and he stays apprised of the laws and practices governing such practice areas. Mr. Hardesty is expected to testify regarding the elements of negligence related to the initiation of foreclosure against Plaintiff, as well as to rebut or clarify the expert opinions and legal conclusions drawn by Plaintiff's proposed expert witnesses, Mr. Kahn and Ms. Emery. All of Mr. Hardesty's opinions are expressed with a reasonable degree of expert certainty.

Mr. Hardesty is expected to testify that he disagrees with Mr. Kahn's opinions and legal conclusions about what is required to process a trust deed foreclosure in Idaho.

Mr. Hardesty is expected to testify that he disagrees with Mr. Kahn's opinion and legal conclusion about the impact of MERS's role as nominee beneficiary on the enforceability of a loan in Idaho.

Mr. Hardesty is expected to testify that he disagrees with Mr. Kahn's opinion and legal conclusion that securitization, even assuming it had occurred in this case, somehow affects the enforceability of the loan.

Mr. Hardesty is expected to testify that the assignment or sale of a loan in the secondary mortgage market does not render the promissory note paid in full and unenforceable.

Mr. Hardesty is expected to testify that the assignment or sale of a loan in the secondary mortgage market does not render the trust deed securing payment of a promissory note "bifurcated" and unenforceable.

Mr. Hardesty is expected to testify about the distinction between loan owners and holders of negotiable instruments.

Mr. Hardesty is expected to testify about MERS's broad authority as nominee for the originating lender, as well as the originating lender's successors and assigns.

Mr. Hardesty is expected to testify that Ms. Emery's opinion that there is a "cloud" in the chain of title without an assignment of a deed of trust by MERS is incorrect.

Mr. Hardesty is expected to testify that even if Ms. Emery's opinion and legal conclusion that a foreclosure sale without a MERS assignment creates a potential "cloud" on the title for purposes of insuring title, Plaintiff would not be damaged or impacted by such "cloud" in the event the sale went forward.

Mr. Hardesty is expected to testify that the Defendants did not breach any duty owed to Plaintiff. He is expected to testify that, even if there was a breach of a duty owed by any of the Defendants, such breach did not cause Plaintiff any damages.

D. Exhibits Used as Support for Opinions

Plaintiff's recorded title documents, Plaintiff's promissory note, MERS Rules of Membership effective in 2010.

E. Qualifications/Publications/Trial-Deposition Testimony/Fee Schedule

1. Qualifications

See attached resumé.

2. Publications

None.

3. Trial/Deposition testimony (past four years)

Ada County Highway District v. Settlers Irrigation District, Ada County Case No. CV OC 0605904 (Deposition)

4. Fee Schedule

Mr. Hardesty charges $350.00 per hour.

DATED this 26 day of April, 2012.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Matthew J. McGee – Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of April, 2012, I caused a true and correct copy of the foregoing **DEFENDANTS' EXPERT WITNESS DISCLOSURE** to be served by the method indicated below, and addressed to the following:

Jon M. Steele
RUNFT & STEELE LAW OFFICES
1020 W. Main Street, Suite 400
Boise, ID 83702
Fax: (208) 343-3246
Attorneys for Plaintiff

( ) U.S. Mail, Postage Prepaid
( ) Hand Delivered
( ) Overnight Mail
(X) Facsimile

_____
Matthew J. McGee

STEPHEN C. HARDESTY

1111 W. JEFFERSON ST., SUITE 500, BOISE, IDAHO 83702 208-388-4822 shardesty@perkinscoie.com

EXPERIENCE

PERKINS COIE LLP
Partner January 2012 – Present

- REAL ESTATE. Represented clients in real estate purchase and sale transactions, financing transactions, structuring and offering of interests in real estate investment funds, and development.

- TITLE INSURANCE. Represented title insurers and insureds in real estate related matters pursuant to title insurance policies.

- BUSINESS TRANSACTIONS. Represented lenders, mezzanine funds, venture capital firms, and businesses in connection with corporate transactions, private placements, financing transactions, and mergers and acquisitions.

HAWLEY TROXELL ENNIS & HAWLEY, LLP
Partner 1997 – January 2012

HAWLEY TROXELL ENNIS & HAWLEY, LLP
Associate April 1991 – 1996

Associate practicing real estate and commercial litigation and general business transactions.

LINDLEY LAZAR & SCALES, SAN DIEGO, CALIFORNIA
Associate *September 1987 – November 1990*

Represented clients in real estate and business litigation, including title insurance defense, mechanics' liens, banking law, and representation of FDIC in state and federal courts in California.

EDUCATION

SCHOOL OF LAW, UNIVERSITY OF CALIFORNIA, DAVIS J.D. 1987

U.C. DAVIS LAW REVIEW, 1985-86, EDITORIAL BOARD, 1986-87

BAR ADMISSIONS

California State Bar, December 14, 1987.

Idaho State Bar, April 18, 1991.

PROFESSIONAL AFFILIATIONS AND ACTIVITIES

American Bar Association

Business and Corporate Law Section Idaho State Bar: Chairperson (2006-2007); CLE Chairperson (2005-2006); Treasurer (2004-2005); CLE Chairperson (2007-2008)

Intermountain Venture Capital Forum: Steering Committee (2005 and 2006); Selection Committee (2003, 2004, and 2006).

Fax Call Report HP LaserJet **M3035 MFP Series**

Fax Header Information

Moffatt Thomas
2083855384
Apr-26-2012 04:49 PM

Job	Date/Time	Type	Identification	Duration	Pgs	Result
9786	Apr-26-2012 04:45 PM	Send	2876919	2:42	9	Success

Moffatt Thomas
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Mailing Address
PO Box 829
Boise ID 83701-0829

208 345 2000
208 385 5384 Fax
208 385 5416 Direct

FACSIMILE

From: Matthew J. McGee **Date:** April 26, 2012

Re: Renshaw vs. Colonial First Lending Group, Inc. Ada County Case No. CV OC 1023898 **File No.:** 23641.0009

Number of pages being transmitted including the cover page: 9
Please call fax operator at (208) 345-2000 if all pages are not received.

	Name	Organization	Fax No.	Voice No.
To:	Ada County Clerk	Fourth Judicial District	287-6919	287-6900
	Jon M. Steele	Runft & Steele Law Offices	343-3246	

Message:

Please see the following Defendants' Expert Witness Disclosure that we are fax filing and fax serving today.

PLEASE DELIVER IMMEDIATELY

Client:2418853.1

Fax Call Report HP LaserJet **M3035 MFP Series**

Fax Header Information

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Apr-26-2012 04:45 PM

Job	Date/Time	Type	Identification	Duration	Pgs	Result
9785	Apr-26-2012 04:42 PM	Send	3433246	1:45	9	Success

Moffatt Thomas
MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

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Boise ID 83701-0829

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Message:

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PLEASE DELIVER IMMEDIATELY

Client:2418653.1

ADA COUNTY RECORDER J. DAVID NAVARRO AMOUNT 13.00 2
BOISE IDAHO 08/13/10 11:12AM
DEPUTY Bonnie B. Oberbillig
RECORDED-REQUEST OF
LSI TITLE AGENCY INC.
110074820

Recording Requested By:

And When Recorded Mail To:
Pioneer Title Company of Ada County
dba Pioneer Lender Trustee Services
c/o Executive Trustee Services, LLC
2255 North Ontario Street, Suite 400
Burbank, California 91504-3120
(818) 260-1600

Loan No.: 0473793636
T.S. No.:ID-220315-C

NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST

NOTICE IS HEREBY GIVEN that PIONEER TITLE COMPANY OF ADA COUNTY DBA PIONEER LENDER TRUSTEE SERVICES, is the Successor Trustee under the Deed of or Transfer in Trust executed by GREGORY A. RENSHAW, AN UNMARRIED MAN, as Grantor, to PIONEER TITLE COMPANY OF ADA COUNTY, as Trustee, in favor of "MERS" MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., SOLELY AS NOMINEE FOR HOMECOMINGS FINANCIAL, LLC (F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.) A LIMITED LIABILITY COMPANY, as Beneficiary, dated 6/27/2007, recorded 7/3/2007, as Instrument No .107095032 and re-recorded , official records of Ada County, IDAHO, the beneficiary interest in which is presently held by MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.. Said Deed of Trust covers real property situated in said County, describing land therein as follows:
LOT 12, BLOCK 8 IN LAKEWOOD UNIT NO. 15B, ACCORDING TO THE PLAT THEREOF, FILED IN BOOK 56 OF PLATS AT PAGES 5104 AND 5105, RECORDS OF ADA COUNTY, IDAHO.

The Trustee hereby gives notice that a breach of the obligation for which such transfer is security has occurred under the Deed of Trust Note dated 6/27/2007. The nature of such breach being:

Failure to pay the monthly payment due 5/1/2010 of principal, interest and/or impounds and subsequent installments due thereafter; plus late charges; together with all subsequent sums advanced by beneficiary pursuant to the terms and conditions of said deed of trust.
This amount is $7,866.30 as of 8/10/2010

All delinquencies are now due, together with unpaid and accruing taxes, assessments, trustee's fees, attorney's fees, costs and advances made to protect the security associated with this foreclosure. The unpaid principal balance of $236,250.00 together with interest thereon at the current rate of 7.5% per annum from 4/1/2010 until paid.

And that the Beneficiary elects to sell or cause the trust property to be sold to satisfy said obligation.

EXHIBIT 3
NAME: EPPINK
DATE: 06-20-12
QnA Court Reporting, LLC

NOTICE OF DEFAULT AND ELECTION TO SELL UNDER DEED OF TRUST

ID-220315-C
0473793636

Dated: 8/10/2010

PIONEER TITLE COMPANY OF ADA COUNTY DBA PIONEER LENDER TRUSTEE SERVICES BY EXECUTIVE TRUSTEE SERVICES, AS ATTORNEY IN FACT

By: Carlo Magno , authorized signatory

State of California } S.S.
County of Los Angeles }
On 8/10/2010 before me, Sally Beltran Notary Public personally appeared Carlo Magno who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her\their signature(s) on the instrument the person(s), or the entity upon behalf or which the person(s) acted, executed the instrument.
I certify under penalty of perjury under the laws of the State of California that the foregoing paragraph is true and correct.

Signature _____ (Seal)
Sally Beltran

SALLY BELTRAN
Commission # 1777085
Notary Public - California
Los Angeles County
My Comm. Expires Oct 30, 2011

THIS OFFICE IS ATTEMPTING TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

1. Ritchie Eppink
Justice Architect
Idaho Legal Aid Services, Inc.
P.O. Box 453
Boise, Idaho 83701

(208) 345-0106

Mr. Eppink will testify as to his training and background. He will testify as to his *Memorandum Report*, dated May 10, 2012, attached as **Exhibit A**. Mr. Eppink has been engaged at the rate of $150 per hour. Mr. Eppink is available for his deposition upon proper notice and prepayment of his deposition charges.

At this stage of the litigation discovery remains ongoing and there may be additional information gleaned through discovery from Defendants to which Mr. Eppink would opine if that information had been previously produced. If such information is identified, Plaintiff reserves the right to provide this additional information Mr. Eppink, which may result in Amended and/or Updated Expert Reports.

Plaintiff reserves the right to call any expert witness identified, named or designated by any Defendant as set forth in their discovery responses and expert witness disclosures.

Plaintiff also reserves the right not to call any of the persons listed above.

Any of the persons identified above may be called for purposes of rebuttal and/or impeachment.

DATED this 10 day of May 2012.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 10th day of May 2012, a true and correct copy of the foregoing REBUTALL EXPERT WITNESS DISCLOSURE, was served upon opposing counsel as follows:

Matthew J. McGee
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Counsel for Homecomings, MERS, and Executive Trustee Services, LLC

____ US Mail
____ Personal Delivery
__Y__ Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Plaintiff

EXHIBIT A

MEMORANDUM

TO: Jon Steele

FROM: Richard Alan Eppink

DATE: Thursday, May 10, 2012

RE: *Renshaw v. Homecomings Financial, LLC*, Ada County case no. CV OC 1023898

* * * * *

You have asked me to review materials related to the nonjudicial foreclosure concerning your client Gregory Renshaw's home. That home and aborted foreclosure are the subject of the case I've referenced above. I've conducted a review of materials from the records of Ada County, the papers on file in that case, and written discovery responses and document production in that case, and I have reached several conclusions. This memorandum describes those conclusions.

Background and Experience

My review, analysis, and conclusions concerning the aborted foreclosure concerning Mr. Renshaw's home are based on my education, training, and experience in real estate and foreclosure law. I am an attorney licensed to practice law since 2006 in the State of Idaho and before all Idaho state courts and the United States District and Bankruptcy courts for the District of Idaho. Presently, I practice as the Legal Director of the American Civil Liberties Union Foundation of Idaho and as the Justice Architect for Idaho Legal Aid Services. Throughout my career as an attorney, I have practiced extensively in, and with a special focus on, housing and foreclosure law. As Staff Attorney, and then Justice Architect, for Idaho Legal Aid Services, I have represented and advised dozens of families and individuals threatened with the loss of their homes through nonjudicial foreclosure. In order to provide competent and effective advice and representation, I have accordingly conducted dozens of reviews of pending or completed

foreclosures such as Mr. Renshaw's. In many instances, I have determined from those reviews that a foreclosure has been conducted lawfully and properly. In other cases, however, I have identified violations of law on the part of entities pursuing the foreclosure, as well as examples of negligence, misrepresentation, fraud, and deceptive or unconscionable practices on the part of foreclosing entities. My findings appear to be consistent with the findings of many federal and state regulatory agencies, such as the Inspector General of the U.S. Department of Housing and Urban Development and 49 state attorneys general, concerning mortgage foreclosure practices during the past several years.

As a result of my experience with the law and practice of housing and nonjudicial real estate foreclosure in Idaho, I have been asked on numerous occasions to provide training and technical assistance to others on that topic. I have delivered presentations and Continuing Legal Education seminars on housing or foreclosure law to, among others, the national Housing Justice Network, the Idaho Trial Lawyers Association, the Idaho State Bar, the Idaho Mediation Association, the National Consumer Law Center and CFED, and as part of the graduate Public Policy and Administration curriculum at Boise State University. I continuously monitor changes to the statutes and other laws governing foreclosure in Idaho, and I am aware of amendments to the Idaho trust deed statutes over the past several years. Indeed, Idaho legislators have requested my technical assistance in analyzing and formulating several of those amendments, and I have also provided technical assistance, about nonjudicial foreclosure in Idaho, to the American Arbitration Association at its request.

Prior to practicing law, I earned a Bachelor of Science Degree in Computer Science, with distinction, from the University of Virginia, and a Juris Doctorate, *summa cum laude*, from the University of Idaho College of Law, serving as a Managing Editor of the *Idaho Law Review* and

graduating ranked first out of all students in my class. I was selected for and completed a Fulbright Fellowship, the United States government's flagship research exchange program, after finishing law school.

Scope of Review

To conduct my review of the aborted foreclosure concerning Mr. Renshaw's home, I examined materials including the following:

Records of Ada County, including:

Warranty Deed (recorded Jan. 22, 1991)

Judgment and Decree of Divorce (recorded Oct. 21, 1998)

Quitclaim Deed (recorded July 3, 2007)

Deed of Trust (recorded July 3, 2007)

Appointment of Successor Trustee (recorded August 13, 2010)

Notice of Default and Election to Sell under Deed of Trust (recorded August 13, 2010)

Affidavits (recorded December 1, 2010)

Lis Pendens (recorded December 9, 2010)

Rescission of Notice of Default (recorded August 3, 2011)

Interest-Only Period Adjustable Rate Note dated June 27, 2007 (HF000431–435) and Allonge (HF000430)

Defendant Mortgage Electronic Registration Systems, Inc.'s Answers and Responses to Plaintiff's First Set of Interrogatories, Requests for Production of Documents, and Requests for Admission in this case

MERS System Rules of Membership, "vJune2009" and [March 2012] version

MERS bulletins and announcements

Decisions and opinions of state and federal courts concerning pertinent issues

Reports and findings of governmental, regulatory, and independent investigations of mortgage foreclosure practices

Amended Complaint in this case

Decision and briefs concerning summary judgment motions in this case

Defendants' Expert Witness Disclosure (re: Steven C. Hardesty) in this case

I have reviewed these materials to determine whether there may have been violations of the Idaho trust deed statutes or other law governing nonjudicial foreclosure in Idaho, to determine whether the entities pursuing foreclosure concerning Mr. Renshaw's home pursued that foreclosure with reasonable care and without negligence, and to determine whether I agree or disagree with any conclusions reached by Steven Hardesty, who has been disclosed as an expert witness in this case.

Conclusions

Based upon my experience, training, education, and review of pertinent documents and materials, I have reached the following opinions and conclusions.

Failure to record assignments

Under I.C. § 45-1505(1), a trustee under a trust deed may not foreclose that trust deed if any assignments of the trust deed have not been recorded in mortgage records in the counties where the property described in the deed are situated. In contrast to certain procedural requirements set out at I.C. § 45-1506, the Idaho Supreme Court has clearly and multiple times held that I.C. § 45-1505 sets forth mandatory requirements with which a foreclosing entity must

strictly comply. Failure to comply with these requirements would even result in the voiding of a completed trustee's sale, according to the Court.

Although an appointment of a successor trustee instrument was apparently recorded on August 13, 2010, concerning the trust deed involved in this case, I have been unable to locate an assignment of that trust deed, either from the lender, Homecomings Financial, LLC, or the purported "beneficiary" of that trust deed, Mortgage Electronic Registration Systems, Inc. ("MERS"). According to MERS's interrogatory answers and admissions in this case, MERS is not in fact or law the beneficiary of the trust deed. Apparently, Homecomings Financial, LLC, had no interest in the trust deed at the time foreclosure under the Idaho Trust Deed Act (I.C. §§ 45-1502–1515) was commenced, and MERS had no interest other than a sham interest in the trust deed at time. This violation of I.C. § 45-1505 would make any resulting trustee's sale voidable.

The violation is especially egregious considering how simply it could have been avoided. Recording an assignment of the trust deed, to put the borrower on notice of the entities actually interested in the trust deed and pursuing foreclosure, would have cost about $10 to $15 in Ada County and been a routine operation for the entities involved. Instead, the borrower was given a "notice" of default that listed MERS and Homecomings Financial, LLC—the two entities *no longer involved*. This notice would likely cause the borrower to misunderstand or be confused about the entities involved in the trust deed and debt.

I understand that Steven Hardesty, an expert witness that MERS expects to testify at trial in this case, may rely on MERS's "Rules of Membership" in effect in 2010 to support his opinion that a failure to comply with I.C. § 45-1505 would not "cloud" the chain of title to the property involved. I am familiar with the MERS Rules of Membership in effect in 2010, as well

as those now in effect. They are private, internal standards that may be contractual covenants governing MERS members and other beneficiaries of MERS memberships, but they do not preempt state law. MERS apparently recognized this in early 2011, requiring MERS members to execute and record assignments from MERS to the actual beneficiary before pursuing foreclosure, and then changing its Rules of Membership to make that requirement clear.

Improper use of MERS

Had an assignment of the trust deed from MERS to an actual beneficiary been executed and recorded, serious questions would still remain about compliance with I.C. § 45-1505 and the clarity of the chain of title. Because MERS may have never had an interest in the trust deed, it may have been merely a sham beneficiary from the start.[1] If so, any assignment of the trust deed from MERS would not have the intended legal effect of transferring beneficiary status. Even if it did, it would be misleading and confusing to the borrower.

---

[1] This question was at issue in *Trotter v. Bank of N.Y. Mellon*, but the Idaho Supreme Court did not decide it. ___ Idaho ___, ___, No. 38022, 2012 Ida. LEXIS 84 at *12–*13 (Idaho Mar. 23, 2012). Unfortunately, the borrower in that case, proceeding *pro se*, was unable to present cogent argument on the issue. Creditors and foreclosing entities have benefited from borrowers' inability to access effective legal representation. As one court put it:

> This Court has extensive experience with all manner of mortgage related lawsuits filed over the past four or five years. In the Court's experience, many of these cases are filed by pro se litigants. To the degree that attorneys are involved, representation on both sides is often best characterized as barely adequate - or worse. With this in mind, it is not very helpful to be faced with multiplicitous citations to what various district court judges have done with issues allegedly similar to those raised here because the Court has little or no confidence that the issues were competently argued or the facts accurately described. This is not to criticize the district judges presiding over those cases; it is only to recognize the handicaps we all face in attempting to resolve these issues in accordance with the facts and the law.

In re Citimortgage, Inc. Home Affordable Modification Program ("HAMP") Litigation, No. ML 11-2274 DSF (PLAx), Order Granting in Part and Denying in Part Motion to Dismiss n.1 (April 17, 2012) (Dkt. 67).

Entitlement of foreclosing entity to enforce the note

Aside from the absence of any recorded assignment of the trust deed involved in this case, it is not clear which entities have been entitled to enforce the promissory note involved. Articles 3 and 9 of the Uniform Commercial Code as adopted in Idaho (Chapters 3 and 9, Title 28, Idaho Code) govern these questions. The documents I have reviewed suggest that MERS may have never been entitled to enforce the note. An attempt to foreclose, or completed foreclosure, by a person not entitled to enforce the note may be void or voidable, depending on the circumstances. Such an attempt or completed foreclosure may also violate other law, such as the federal Fair Debt Collection Practices Act or the Idaho Consumer Protection Act. Were the law otherwise, I could foreclose on homes I have no interest in, over debt I am not owed, with impunity.

Compliance with covenants in trust deed

The trust deed in this case, in particular section 22 of that instrument, includes covenants requiring notice and acts additional to the requirements of Idaho statutes. I have not located any notice or other document that appears to comply with the additional notice requirements of section 22 of the trust deed.

Careless or fraudulent document preparation

The instruments recorded in the Ada County records concerning this foreclosure bear indications that they were prepared by in a high-volume "document mill" setting. For instance, both the Appointment of Successor Trustee and the Notice of Default were purportedly executed on the same day, the former by a purported "Assistant Secretary" of MERS and the latter by a purported "authorized signatory" of Pioneer Title Company of Ada County. Yet both were notarized by the same California notary public. As another example, the Affidavits of Mailing

are dated August 27, 2010, and signed by an affiant claiming to have personally mailed certain documents on August 27, 2010, yet they were not notarized until more than two weeks later, on September 14, 2010. These circumstances suggest that "robosigning," as it has become popularly known, was involved in this foreclosure. Robosigning is merely a shorthand term for negligent, reckless, or fraudulent affidavit and instrument preparation, or for misfeasant or malfeasant acts or omissions by notaries public. The circumstantial evidence of robosigning in this case suggests additional violations of law and additional unfair or deceptive practices by the foreclosing entities.

Due care

Both individually and cumulatively, the practices in this foreclosure that I have identified above make it appear that the foreclosing entities' concern for their obligations to exercise due care and to comply with laws governing foreclosure and instrument preparation was lackadaisical at best. Given the gravity of the matter involved—a person's home—it is reasonable to require meaningful compliance with those obligations, and it would be unreasonable to permit shortcuts around basic statutory and common law requirements.

Harm to homeowners

The turmoil and anguish that foreclosure visits upon homeowners is hard to overestimate. I have met with many homeowners and tenants caught up in a foreclosure. Those homeowners who face the loss of their only permanent shelter almost always exhibit signs of extreme distress, often combined with physical symptoms of ill-health, deterioration of existing conditions, and exacerbation of disabilities. When careless, confusing, or deceptive practices or documents are involved in the foreclosure, this harm is often magnified due to the needless frustration created by the foreclosing entities. The home is a core concept in American life, recognized again and

again in both our legal traditions and modern jurisprudence as holding a very special, perhaps unique, sanctity. Because such a fundamental component of national, cultural, and personal identity is assaulted by the improper practices of foreclosing parties, it is no surprise that the harm those practices can cause is especially great.

Contact Information

Should you have any questions about anything in this memorandum, or if you would like me to examine any additional materials or analyze any other issues, please contact me:

Richard Alan Eppink
P.O. Box 453
Boise, ID 83701

23

Return To: Homecomings Financial
One Meridian Crossing, Ste. 100
Minneapolis MN 55423
Loan Number: 047-379363-6

ADA COUNTY RECORDER J. DAVID NAVARRO AMOUNT ~~75.00~~ ~~25~~ 69.00 23
BOISE IDAHO 07/03/07 02:28 PM
DEPUTY Bonnie Oberbillig
RECORDED-REQUEST OF
Pioneer
107095032

Prepared By: Homecomings Financial
188 106th Ave NE, Suite 600
Bellevue, WA 98004

282363 DWHSG

[Space Above This Line For Recording Data]

DEED OF TRUST

MIN 100062604737936361

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated JUNE 27TH, 2007 together with all Riders to this document.
(B) "Borrower" is
GREGORY A. RENSHAW, ~~A SEPARATE ESTATE~~ an unmarried man

EXHIBIT 5
NAME: EPPINK
DATE: 06-20-12
QnA Court Reporting, LLC

Borrower is the trustor under this Security Instrument.
(C) "Lender" is HOMECOMINGS FINANCIAL, LLC (F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.)
Lender is a LIMITED LIABILITY COMPANY
organized and existing under the laws of DELAWARE

Lender's address is 188 106TH AVENUE NE, SUITE 600
BELLEVUE, WA 98004
(D) "Trustee" is PIONEER TITLE COMPANY OF ADA COUNTY

(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.
(F) "Note" means the promissory note signed by Borrower and dated JUNE 27TH, 2007 .
The Note states that Borrower owes Lender TWO HUNDRED THIRTY SIX THOUSAND TWO HUNDRED FIFTY AND NO/100 Dollars
(U.S. $ 236,250.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than JULY 1ST, 2037 .
(G) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."
(H) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.
(I) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

[X] Adjustable Rate Rider	[ ] Condominium Rider	[ ] Second Home Rider
[ ] Balloon Rider	[X] Planned Unit Development Rider	[ ] 1-4 Family Rider
[ ] VA Rider	[ ] Biweekly Payment Rider	[ ] Other(s) [specify]

(J) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.
(K) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.
(L) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.
(M) "Escrow Items" means those items that are described in Section 3.
(N) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.
(O) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.
(P) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

Initials:

(Q) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.
(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

TRANSFER OF RIGHTS IN THE PROPERTY
The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the COUNTY [Type of Recording Jurisdiction]
of ADA [Name of Recording Jurisdiction] :
Legal description attached hereto and made a part hereof

Parcel ID Number: 016R5125660450 which currently has the address of
3480 SOUTH PIMMIT PLACE , [Street]
BOISE [City], Idaho 83706 [Zip Code]
("Property Address"):

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclosure and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

Initials:

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

2. Application of Payments or Proceeds. Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. Funds for Escrow Items. Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to

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be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

4. Charges; Liens. Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the

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lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with

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the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. Occupancy. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. Preservation, Maintenance and Protection of the Property; Inspections. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Borrower's Loan Application. Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable

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attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

10. Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

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(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

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12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

13. Joint and Several Liability; Co-signers; Successors and Assigns Bound. Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

14. Loan Charges. Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. Notices. All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

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16. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. Borrower's Copy. Borrower shall be given one copy of the Note and of this Security Instrument.

18. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. Borrower's Right to Reinstate After Acceleration. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. Sale of Note; Change of Loan Servicer; Notice of Grievance. The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA

Initials: _____

requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. Hazardous Substances. As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

Initials:

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which any part of the Property is located. Lender or Trustee shall mail copies of the notice as prescribed by Applicable Law to Borrower and to other persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

23. Reconveyance. Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

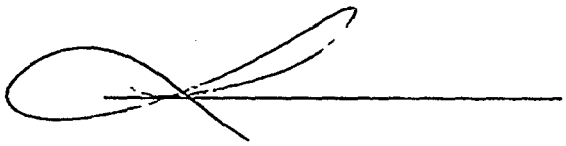
24. Substitute Trustee. Lender may, for any reason or cause, from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

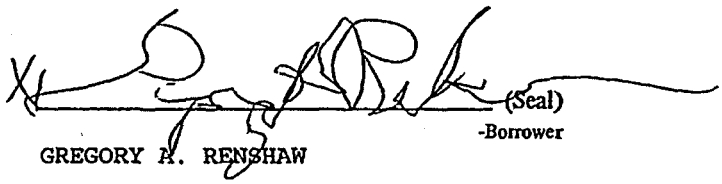
25. Area and Location of Property. Either the Property is not more than 40 acres in area or the Property is located within an incorporated city or village.

Initials:

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:





(Seal)
-Borrower

GREGORY A. RENSHAW

_____

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

STATE OF IDAHO, Ada County ss:

On this 27 day of June 2007, before me, the undersigned, a Notary Public in and for said county and state, personally appeared GREGORY A. RENSHAW, ~~A SEPARATE ESTATE~~ GAR,

known or proved to me to be the person(s) who executed the foregoing instrument, and acknowledged to me that he/she/they executed the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

DIANA L. HOTTENDORF NOTARY PUBLIC STATE OF IDAHO

Notary Public residing at:

My Commission Expires: DIANA L. HOTTENDORF
COMMISSION EXPIRES 04/05/13
RESIDING: MERIDIAN, IDAHO

Initials: GAR

PLANNED UNIT DEVELOPMENT RIDER

THIS PLANNED UNIT DEVELOPMENT RIDER is made this 27TH day of JUNE, 2007, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date, given by the undersigned (the "Borrower") to secure Borrower's Note to

HOMECOMINGS FINANCIAL, LLC (F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.)

(the "Lender") of the same date and covering the Property described in the Security Instrument and located at:

3480 SOUTH PIMMIT PLACE
BOISE, ID 83706

[Property Address]

The Property includes, but is not limited to, a parcel of land improved with a dwelling, together with other such parcels and certain common areas and facilities, as described in COVENANTS, CONDITIONS, AND RESTRICTIONS

(the "Declaration"). The Property is a part of a planned unit development known as SOUTHEAST BOISE/ LAKEWOOD SUBDIVISI

[Name of Planned Unit Development]

(the "PUD"). The Property also includes Borrower's interest in the homeowners association or equivalent entity owning or managing the common areas and facilities of the PUD (the "Owners Association") and the uses, benefits and proceeds of Borrower's interest.

PUD COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. PUD Obligations. Borrower shall perform all of Borrower's obligations under the PUD's Constituent Documents. The "Constituent Documents" are the (i) Declaration; (ii) articles of incorporation, trust instrument or any equivalent document which creates the Owners Association; and (iii) any by-laws or other rules or regulations of the Owners Association. Borrower shall promptly pay, when due, all dues and assessments imposed pursuant to the Constituent Documents.

B. Property Insurance. So long as the Owners Association maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring the Property which is satisfactory to Lender and which provides insurance coverage in the amounts (including deductible levels), for the periods, and against loss by fire, hazards included within the term "extended coverage," and any other hazards, including, but not limited to, earthquakes and floods, for which Lender requires insurance, then: (i) Lender waives the provision in Section 3 for the Periodic Payment to Lender of the yearly premium installments for property insurance on the Property; and (ii) Borrower's obligation under Section 5 to maintain property insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy.

What Lender requires as a condition of this waiver can change during the term of the loan.

Borrower shall give Lender prompt notice of any lapse in required property insurance coverage provided by the master or blanket policy.

In the event of a distribution of property insurance proceeds in lieu of restoration or repair following a loss to the Property, or to common areas and facilities of the PUD, any proceeds payable to Borrower are hereby assigned and shall be paid to Lender. Lender shall apply the proceeds to the sums secured by the Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

C. Public Liability Insurance. Borrower shall take such actions as may be reasonable to insure that the Owners Association maintains a public liability insurance policy acceptable in form, amount, and extent of coverage to Lender.

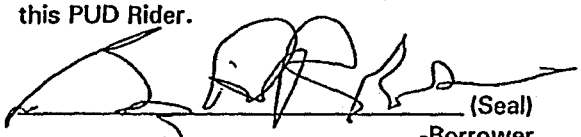
D. Condemnation. The proceeds of any award or claim for damages, direct or consequential, payable to Borrower in connection with any condemnation or other taking of all or any part of the Property or the common areas and facilities of the PUD, or for any conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender. Such proceeds shall be applied by Lender to the sums secured by the Security Instrument as provided in Section 11.

E. Lender's Prior Consent. Borrower shall not, except after notice to Lender and with Lender's prior written consent, either partition or subdivide the Property or consent to: (i) the abandonment or termination of the PUD, except for abandonment or termination required by law in the case of substantial destruction by fire or other casualty or in the case of a taking by condemnation or eminent domain; (ii) any amendment to any provision of the "Constituent Documents" if the provision is for the express benefit of Lender; (iii) termination of professional management and assumption of self-management of the Owners Association; or (iv) any action which would have the effect of rendering the public liability insurance coverage maintained by the Owners Association unacceptable to Lender.

F. Remedies. If Borrower does not pay PUD dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph F shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

Initials: _____

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this PUD Rider.



_____ (Seal)
-Borrower
GREGORY A. RENSHAW

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

_____ (Seal)
-Borrower

FIXED/ADJUSTABLE RATE RIDER

(LIBOR One-Year Index (As Published In *The Wall Street Journal*)- Rate Caps)

THIS FIXED/ADJUSTABLE RATE RIDER is made this 27TH day of JUNE, 2007 , and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Fixed/Adjustable Rate Note (the "Note") to HOMECOMINGS FINANCIAL, LLC (F/K/A HOMECOMINGS FINANCIAL NETWORK, INC.)
("Lender") of the same date and covering the property described in the Security Instrument and located at: 3480 SOUTH PIMMIT PLACE
BOISE, ID 83706
[Property Address]

THE NOTE PROVIDES FOR A CHANGE IN BORROWER'S FIXED INTEREST RATE TO AN ADJUSTABLE INTEREST RATE. THE NOTE LIMITS THE AMOUNT BORROWER'S ADJUSTABLE INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE BORROWER MUST PAY.

ADDITIONAL COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

A. ADJUSTABLE RATE AND MONTHLY PAYMENT CHANGES

The Note provides for an initial fixed interest rate of 7.5000 %. The Note also provides for a change in the initial fixed rate to an adjustable interest rate, as follows:

4. ADJUSTABLE INTEREST RATE AND MONTHLY PAYMENT CHANGES

(A) Change Dates

The initial fixed interest rate I will pay will change to an adjustable interest rate on the first day of JULY, 2012 , and the adjustable interest rate I will pay may change on that day every 12th month thereafter. The date on which my initial fixed interest rate changes to an adjustable interest rate, and each date on which my adjustable interest rate could change, is called a "Change Date."

(B) The Index

Beginning with the first Change Date, my adjustable interest rate will be based on an Index. The "Index" is the average of interbank offered rates for one-year U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in The Wall Street Journal. The most recent Index figure available as of the date 45 days before each Change Date is called the "Current Index."

If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

(C) Calculation of Changes

Before each Change Date, the Note Holder will calculate my new interest rate by adding TWO AND ONE FOURTH percentage points (2.2500 %) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date.

The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

(D) Limits on Interest Rate Changes

The interest rate I am required to pay at the first Change Date will not be greater than 12.5000 % or less than 2.5000 %. Thereafter, my adjustable interest rate will never be increased or decreased on any single Change Date by more than two percentage points from the rate of interest I have been paying for the preceding 12 months. My interest rate will never be greater than 12.5000 %.

(E) Effective Date of Changes

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

(F) Notice of Changes

The Note Holder will deliver or mail to me a notice of any changes in my initial fixed interest rate to an adjustable interest rate and of any changes in my adjustable interest rate before the effective date of any change. The notice will include the amount of my monthly payment, any information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER

1. Until Borrower's initial fixed interest rate changes to an adjustable interest rate under the terms stated in Section A above, Uniform Covenant 18 of the Security Instrument shall read as follows:

Initials: _____

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

2. When Borrower's initial fixed interest rate changes to an adjustable interest rate under the terms stated in Section A above, Uniform Covenant 18 of the Security Instrument described in Section B1 above shall then cease to be in effect, and the provisions of Uniform Covenant 18 of the Security Instrument shall be amended to read as follows:

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within

Initials: _____

which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Fixed/Adjustable Rate Rider.

GREGORY A. RENSHAW

_____ (Seal) -Borrower	_____ (Seal) -Borrower
_____ (Seal) -Borrower	_____ (Seal) -Borrower
_____ (Seal) -Borrower	_____ (Seal) -Borrower
_____ (Seal) -Borrower	_____ (Seal) -Borrower

282363

EXHIBIT A

Lot 12, Block 8 in Lakewood Unit No. 15B, according to the plat thereof, filed in Book 56 of Plats at Pages 5104 and 5105, records of Ada County, Idaho.

Ritchie Eppink

From: Karissa Armbrust [KArmbrust@runftsteele.com]
Sent: Monday, June 18, 2012 7:17 AM
To: Ritchie Eppink
Subject: FW: Renshaw - Notice Depo Duces Tecum Richard Eppink 06-14-12 SEE EMAIL!
Attachments: doc20120614153259.pdf

Attached is your deposition notice.

Karissa Armbrust, PP
Runft & Steele Law Offices, PLLC
1020 W. Main St., Suite 400
Boise, ID 83702
Phone: 208-333-8506
Fax: 208-343-3246
www.runftsteele.com

-----Original Message-----
From: TJ Wiggs
Sent: Friday, June 15, 2012 10:38 AM
To: Jon Steele (JSteele@runftsteele.com); Karissa Armbrust (KArmbrust@runftsteele.com)
Subject: Renshaw - Notice Depo Duces Tecum Richard Eppink 06-14-12 SEE EMAIL!

Do we need to forward this to Richie?

T.J. Wiggs
Paralegal
Runft & Steele Law Offices, PLLC
1020 W. Main St. Suite 400
Boise, Idaho 83702
(208) 333-8506
(208) 343-3246 Fax
twiggs@runftsteele.com

-----Original Message-----
From: kyocera@runftsteele.com [mailto:kyocera@runftsteele.com]
Sent: Thursday, June 14, 2012 3:33 PM
To: TJ Wiggs
Subject: Scanned Document

TASKalfa 500ci
[00:c0:ee:4c:d2:73]

EXHIBIT 6
NAME: EPPINK
DATE: 06-20-12
QnA Court Reporting, LLC

Ritchie Eppink

From: Karissa Armbrust [KArmbrust@runftsteele.com]
Sent: Thursday, June 14, 2012 2:01 PM
To: Ritchie Eppink
Subject: RE: Renshaw v. MERS - Deposition

June 20th at 9:00 a.m. I will send the notice when I get it.

From: Ritchie Eppink [mailto:reppink@acluidaho.org]
Sent: Thursday, June 14, 2012 10:04 AM
To: Karissa Armbrust
Subject: RE: Renshaw v. MERS - Deposition

Yes. /re

From: Karissa Armbrust [mailto:KArmbrust@runftsteele.com]
Sent: Thursday, June 14, 2012 10:04 AM
To: Ritchie Eppink
Subject: RE: Renshaw v. MERS - Deposition

Are mornings okay?

From: Ritchie Eppink [mailto:reppink@acluidaho.org]
Sent: Thursday, June 14, 2012 9:46 AM
To: Karissa Armbrust
Subject: RE: Renshaw v. MERS - Deposition

6/20 and 6/25 is all I have in the next couple weeks. -Ritchie

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From: Karissa Armbrust [mailto:KArmbrust@runftsteele.com]
Sent: Thursday, June 14, 2012 9:36 AM
To: Ritchie Eppink
Subject: Renshaw v. MERS - Deposition
Importance: High

Dear Ritchie:

MERS' attorneys would like to take your deposition in the next two weeks. Could you give me a couple of available dates.

Sincerely,

Karissa Armbrust, PP
Runft & Steele Law Offices, PLLC
1020 W. Main St., Suite 400
Boise, ID 83702
Phone: 208-333-8506
Fax: 208-343-3246
www.runftsteele.com

Ritchie Eppink <ritchieeppink@idaholegalaid.org>

GMAC bankruptcy

6 messages

Ritchie Eppink <ritchieeppink@idaholegalaid.org> Mon, May 14, 2012 at 9:09 AM
To: Jon M Steele <JSteele@runftsteele.com>

Jon, FYI, GMAC's mortgage-related companies, including Executive Trustee Services, LLC, have filed for chapter 11 bankruptcy protection this morning. I've attached a copy of their motion for joint administration. -Ritchie

--

Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)

HSG FCLOSURE GMAC mtg Ch. 11 Jt Admin motion.pdf
99K

Ritchie Eppink <ritchieeppink@idaholegalaid.org> Mon, May 14, 2012 at 9:10 AM
To: Jon M Steele <JSteele@runftsteele.com>

Homecomings Financial, LLC, is also included. FYI /re

--

Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)

[Quoted text hidden]

Jon Steele <JSteele@runftsteele.com> Tue, May 15, 2012 at 4:29 PM
To: Ritchie Eppink <ritchieeppink@idaholegalaid.org>

Thanks for the heads up Ritchie

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Monday, May 14, 2012 9:10 AM
To: Jon Steele
Subject: GMAC bankruptcy

[Quoted text hidden]

Jon Steele <JSteele@runftsteele.com> Wed, May 16, 2012 at 7:40 AM
To: Ritchie Eppink <ritchieeppink@idaholegalaid.org>

Any info on MERS bankruptcy?

I still have MERS on a negligence count and a violation of Idaho Consumer Protection Act.

I plan to move ahead.

S/J motions will be heard next Tuesday.

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Monday, May 14, 2012 9:11 AM
To: Jon Steele
Subject: Re: GMAC bankruptcy

[Quoted text hidden]

Ritchie Eppink <ritchieeppink@idaholegalaid.org> Wed, May 16, 2012 at 8:00 AM
To: Jon Steele <JSteele@runftsteele.com>

No. See attached article that you may find helpful. -Ritchie

—
Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)

[Quoted text hidden]

CNSMR bankruptcy and consumer claims - nclc-rpts-bankr-jul-aug-2007.pdf
167K

Jon Steele <JSteele@runftsteele.com> Wed, May 16, 2012 at 11:30 AM
To: Ritchie Eppink <ritchieeppink@idaholegalaid.org>

Thanks Ritchie

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Wednesday, May 16, 2012 8:01 AM

[Quoted text hidden]

[Quoted text hidden]

Ritchie Eppink <ritchieeppink@idaholegalaid.org>

(no subject)

1 message

Jon Steele <JSteele@runftsteele.com> Tue, May 8, 2012 at 6:56 PM
To: ritchieeppink@idaholegalaid.org

Ritchie,

You tabbed pages 9, 10, 11,24, 25, 26, 30, 47, and 48 of the attached

Jon M. Steele

Runft & Steele Law Offices, PLLC

1020 W. Main St., Ste 400

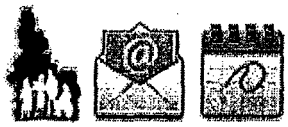
Boise, Idaho 83702

(208) 333-9495

(208) 343-3246 (fax)

jsteele@runftsteele.com

MERSAns1stSet_Discovery_06082011.pdf
2078K



Ritchie Eppink <ritchieeppink@idaholegalaid.org>

(no subject)

Inbox

Jon Steele <JSteele@runftsteele.com> Tue, May 8, 2012 at 6:48 PM
To: ritchieeppink@idaholegalaid.org

Ritchie,

Sorry, I am sending you more than you asked for.

HF 430-435 is included in this batch

Jon M. Steele

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Boise, Idaho 83702

(208) 333-9495

(208) 343-3246 (fax)

jsteele@runftsteele.com

HF000336 - HF 000608 HC's Rsps to Pfl's 1st set of Rogs and RFP PART 2_Discovery_04082011.pdf
11004K

Ritchie Eppink <ritchieeppink@idaholegalaid.org>

(no subject)

1 message

Jon Steele <JSteele@runftsteele.com> Tue, May 8, 2012 at 6:50 PM
To: ritchieeppink@idaholegalaid.org

HF 598-602 is in the batch I just sent to you

Jon M. Steele

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(208) 333-9495

(208) 343-3246 (fax)

jsteele@runftsteele.com

Ritchie Eppink <ritchieeppink@idahoiegalaid.org>

MERS deposition

1 message

Karissa Armbrust <KArmbrust@runftsteele.com> Fri, May 4, 2012 at 9:09 AM
To: ritchieeppink@idaholegalaid.org
Cc: Jon Steele <JSteele@runftsteele.com>

Dear Mr. Eppink:

Jon thought you might be interested in the attached deposition of MERS. I did not attach the exhibits as they were quite large. Let me know if you would like me to mail them to you.

Sincerely,

Karissa Armbrust, PP

Runft & Steele LawOffices, PLLC

1020 W. Main St., Suite 400

Boise, ID 83702

Phone: 208-333-8506

Fax: 208-343-3246

www.runftsteele.com

MERS depo_Miscellaneous_05042012.pdf
6449K

Renshaw v. MERS, Homecomings and Executive Trustee Services

11 messages

Jon Steele <JSteele@runftsteele.com> Fri, Apr 13, 2012 at 3:55 PM
To: Ritchie Eppink <ritchieeppink@idaholegalaid.org>

Ritchie-

Presently there is no foreclosure. They rescinded the Notice of Default last August. I filed my motion for S/J on Wednesday. It is attached.

I could use any Idaho district court decisions you have that involves MERS, Homecomings or Executive Trustee Services as defendants. Especially if Moffat Thomas represents a defendant. I would like to show a pattern of behavior and the actual knowledge of these defendants and/or their attorneys that they are continually violating the law.. I have the Ralph case decided by Judge Brody on the failure to record the assignments.. Anything in that area would also be appreciated..

Thank for your comments

In this area of the law you are the Architect of Justice

I'm just trying to follow in your footsteps..

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Tuesday, April 10, 2012 5:28 PM
To: Jon Steele
Subject: Re: 21 million dollar RESPA verdict- Renshaw v. MERS, Homecomings and Executive Trustee Services

Jon- I read the brief. Is Homecomings the entity trying to foreclose? YES And did I read the brief right on page 9 that Homecomings has admitted that it is not the current holder of the note and is not in possession of it? YES

If so, I think you only need a very short brief- that should be enough to halt the foreclosure.

-Ritchie
--
Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)

On Tue, Apr 3, 2012 at 15:00, Jon Steele <JSteele@runftsteele.com> wrote:

Thanks

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Tuesday, April 03, 2012 1:52 PM
To: Jon Steele
Subject: Re: 21 million dollar RESPA verdict- Renshaw v. MERS, Homecomings and Executive Trustee Services

Okay- I haven't had a chance to read it yet, but I should have some time to do that before 4/11. -Ritchie

--
Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)

On Tue, Apr 3, 2012 at 13:28, Jon Steele <JSteele@runftsteele.com> wrote:

My motion for SJ is not due until next Wednesday the 11th. Comments are appreciated..

From: Jon Steele
Sent: Thursday, March 29, 2012 5:13 PM
To: 'Ritchie Eppink'
Subject: RE: 21 million dollary RESPA verdict

Procrastination is bad. And I never met a lawyer who didn't push it to 4:59pm for his entry into the Courthouse.

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Thursday, March 29, 2012 5:10 PM
To: Jon Steele
Subject: Re: 21 million dollary RESPA verdict

Hey, don't call is procrasinating- if you're not cutting it close to your deadline, you're not doing enough work, right? /re

--
Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)

(208) 342-2561 (fax)

On Thu, Mar 29, 2012 at 16:51, Jon Steele <JSteele@runftsteele.com> wrote:

Ritchie,

I appreciate whatever you can give me. And I apologize for being a fucking procrastinating lawyer.

Thank you very much.

Travel safely

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Thursday, March 29, 2012 4:36 PM

To: Jon Steele
Subject: Re: 21 million dollary RESPA verdict

Unfortunately, there's probably no way. I'm leaving early in the morning and won't be back until late Sunday. I've got jury instructions and briefing due on Monday.

If you want to send what you've got over, I'll take it on the road with me and give it a glance if I can. I wish I could make a promise to you, but under these circumstances I just can't.

-Ritchie
--
Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)

On Thu, Mar 29, 2012 at 16:24, Jon Steele <JSteele@runftsteele.com> wrote:

Monday, April 2

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Thursday, March 29, 2012 4:22 PM

To: Jon Steele
Subject: Re: 21 million dollary RESPA verdict

When do you need comments by? /re
--
Richard Alan Eppink
Attorney at Law / Justice Architect

IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)

On Thu, Mar 29, 2012 at 16:09, Jon Steele <JSteele@runftsteele.com> wrote:

Hi Ritchie,

Can I email you what I have and ask for your comments??

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Thursday, March 29, 2012 4:04 PM
To: Jon Steele
Subject: Re: 21 million dollary RESPA verdict

Jon- Can I give you a call next week about this, or have you got a deadline? I'm trying to get out of town but will make time to call you before that if you need to talk asap. /re

--
Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)

On Thu, Mar 29, 2012 at 15:16, Jon Steele <JSteele@runftsteele.com> wrote:

Hi Ritchie,

Just left a phone message for you.

I need to speak to the Architect of Justice..

From: Richard Alan Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Friday, July 01, 2011 2:34 PM

To: Jon Steele
Subject: RE: 21 million dollary RESPA verdict

Thanks, Jon- Here's what I think I can do in this timeline- I'm going to print these off and try to go through them over the weekend. I've also already put an email out for some stellar HAMP private right of action and MERS briefs to a select group of folks around the country who I know have done good work on these HAMP cases. If I've got any ideas for you by independence day, I'll try to share them- either on Monday or, if I'm still here, on Tuesday. Will you be available by phone on Monday (or maybe I should say- do you want to be??)

-Ritchie

From: Jon Steele [mailto:JSteele@runftsteele.com]
Sent: Friday, July 01, 2011 2:25 PM
To: Richard Alan Eppink
Subject: RE: 21 million dollary RESPA verdict

Ritchie,

Attached are the briefs. The additional briefing is due next Wednesday. I apologize for imposing on you.

Any assistance you can give is greatly appreciated.

Where are you going on vacation?

Jon M. Steele

Runft & Steele Law Offices, PLLC

1020 W. Main Street, Suite 400

Boise, ID 83702

(208) 333-9495

Fax: (208) 343-3246

JSteele@runftsteele.com

www.runftsteele.com

From: Richard Alan Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Friday, July 01, 2011 12:05 PM
To: Jon Steele
Subject: RE: 21 million dollary RESPA verdict

Jon- When is this next round of briefing due? And could you send me the briefs already in? I can look these over and then let's chat. I am *supposed* to leave for my first vacation in forever next Tuesday, but I've got a 7/7 hearing that for some reason won't go away, so we'll see. Point of all that is: if you can get those briefs to me today, there's a chance I might be able to get back to you Tuesday. Thanks, -Ritchie

--

Richard Alan Eppink

Attorney at Law / Justice Architect

IDAHO LEGAL AID SERVICES, INC.

310 North Fifth Street

Boise, Idaho 83702

(208) 345-0106, ext. 103 (tel)

(208) 342-2561 (fax)

From: Jon Steele [mailto:JSteele@runftsteele.com]
Sent: Friday, July 01, 2011 6:48 AM
To: Richard Alan Eppink
Cc: Kahle Becker
Subject: RE: 21 million dollary RESPA verdict

Hi Ritchie,

Judge Williamson heard defendant's motion to dismiss on the pleadings. She has three questions that she wants briefing on:

1. What effect that MERS is simply referred to in the DOT and not a signatory?
2. Recent case law on MERS as the beneficiary
3. Does HAMP create a private cause of action?

Can you help me out by providing any recent decisions?

And I would like to list you as an expert witness.

I think I have Judge Williams ear. This could be the Idaho test case.

Thanks. You have been a great source of info for me and I appreciate you sharing your knowledge.

Jon M. Steele

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1020 W. Main Street, Suite 400

Boise, ID 83702

(208) 333-9495

Fax: (208) 343-3246

JSteele@runftsteele.com

www.runftsteele.com

From: Richard Alan Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Thursday, March 24, 2011 9:07 AM
To: Jon Steele; Kahle Becker
Subject: 21 million dollary RESPA verdict

Jon, Kahle-

This just in- verdict from a Georgia jury from Monday on a RESPA case about failure to fix an incorrect $2,418 mortgage arrears-

$575 compensatory

$1,000,000 emotional distress

$20,000,000 punitive

$350,000 attorney fees

See complaint and verdict form attached. No citation for this case, so I hope you can open the attachments.

/re

--

Richard Alan Eppink

Attorney at Law / Justice Architect

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310 North Fifth Street

Boise, Idaho 83702

(208) 345-0106, ext. 103 (tel)

(208) 342-2561 (fax)

Memorandum in Support of Mot for SJ 03-27-12.doc
160K

Ritchie Eppink <ritchieeppink@idaholegalaid.org> Fri, Apr 27, 2012 at 3:00 PM
To: Jon Steele <JSteele@runftsteele.com>

Jon- I got your voicemail, and Kahle phoned me about it as well. Can you email me the defendant's expert report? I'll take a look at it and see if I can help. -Ritchie

--
Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)
[Quoted text hidden]

Jon Steele <JSteele@runftsteele.com> Fri, Apr 27, 2012 at 4:51 PM
To: Ritchie Eppink <ritchieeppink@idaholegalaid.org>

It will be hand delivered to the Architect of Justice by special courier in approximately 3 minutes.

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Friday, April 27, 2012 3:01 PM
To: Jon Steele
Subject: Re: Renshaw v. MERS, Homecomings and Executive Trustee Services

[Quoted text hidden]

Ritchie Eppink <ritchieeppink@idaholegalaid.org> Wed, May 2, 2012 at 7:11 AM
To: Jon Steele <JSteele@runftsteele.com>

I have your voicemail. I've been trying to find a few minutes to give you a call. I'll try today at around 5p. /re

--
Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)
[Quoted text hidden]

Jon Steele <JSteele@runftsteele.com> Wed, May 2, 2012 at 11:40 AM
To: Ritchie Eppink <ritchieeppink@idaholegalaid.org>

My cell phone is 371-4000

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Wednesday, May 02, 2012 7:11 AM
To: Jon Steele
Subject: Re: Renshaw v. MERS, Homecomings and Executive Trustee Services

[Quoted text hidden]

Ritchie Eppink <ritchieeppink@idaholegalaid.org> Thu, May 3, 2012 at 3:27 PM
To: Jon Steele <JSteele@runftsteele.com>

Jon- I left you a voicemail yesterday afternoon. I hope you got what you needed before your deadline. Let me know if you think there's something I can do to help. -Ritchie

--
Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)
[Quoted text hidden]

Jon Steele <JSteele@runftsteele.com> Fri, May 4, 2012 at 8:39 AM
To: ritchieeppink@idaholegalaid.org
Cc: JSteele@runftsteele.com

Thanks Ritchie,

Attached is my memo in support of plaintiff's motion for S/J.

Also attached is defendants motion for S/J and Expert Report of Mr. Steve Hardesty. I would like to retain you as an expert for two purposes in this litigation:

1. To oppose defendants S/J motion

2. To rebut Mr. Hardesty's Expert Report.

I would like to do this in one document which will be filed no later than next Monday, May 14 - Expert Rebuttal Report of Mr. Eppink, which will include your CV including employment history, your papers and presentations, compensation agreement, cases in which you have testified as an expert over the last 4 years. And then the rebuttal.

I understand your busy schedule. My wife and I are in the process of moving to Hidden Springs. It is chaos.

I am not sure about the cell reception out there but when you get the chance please call me on my cell phone.

If you simply can't work this i9n please let me know.

Thanks

Jon M. Steele

Runft & Steele Law Offices, PLLC

1020 W. Main St., Ste 400

Boise, Idaho 83702

(208) 333-9495

(208) 343-3246 (fax)

jsteele@runftsteele.com

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Wednesday, May 02, 2012 7:11 AM
To: Jon Steele
Subject: Re: Renshaw v. MERS, Homecomings and Executive Trustee Services

[Quoted text hidden]

3 attachments

MemoSuppSJ_Pleadings_05042012.pdf
853K

MemoSuppDefMotSJ_Pleadings_03222012.pdf
920K

DefExpertWitDisc_Discovery_05012012.pdf
160K

Ritchie Eppink <ritchieeppink@idaholegalaid.org> Fri, May 4, 2012 at 8:46 AM
To: Jon Steele <JSteele@runftsteele.com>

When is the trial and how long is it set for?

If I'm available then, I'll look these materials over this weekend and get back you.

-Ritchie

—
Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)
[Quoted text hidden]

Jon Steele <JSteele@runftsteele.com> Fri, May 4, 2012 at 7:07 PM
To: Ritchie Eppink <ritchieeppink@idaholegalaid.org>

Hi Ritchie,

Give me a call on my cell phone 371-4000 to let me know if you are available..

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Friday, May 04, 2012 8:47 AM
To: Jon Steele
Subject: Re: FW: Renshaw v. MERS, Homecomings and Executive Trustee Services

When is the trial and how long is it set for? The trial is set to start on July 10th. 4 days
If I'm available then, I'll look these materials over this weekend and get back you. Please note that I would like to do this in one document which will be filed no later than next Monday, May 14 - Expert Rebuttal Report of Mr. Eppink, which will include your CV including employment history, your papers and presentations, compensation agreement, cases in which you have testified as an expert over the last 4 years. And then the rebuttal.

[Quoted text hidden]

[Quoted text hidden]

Jon Steele <JSteele@runftsteele.com> Mon, May 7, 2012 at 2:37 PM
To: ritchieeppink@idaholegalaid.org

Hi Ritchie,

This is the material I sent to you on Friday. The other info is just too voluminous to email to you. Could we meet tonite or tomorrow morning?

From: Jon Steele
Sent: Friday, May 04, 2012 8:39 AM
To: Richard Alan Eppink (ritchieeppink@idaholegalaid.org)
Cc: Jon Steele (JSteele@runftsteele.com)

Subject: FW: Renshaw v. MERS, Homecomings and Executive Trustee Services

[Quoted text hidden]

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3 attachments

MemoSuppSJ_Pleadings_05042012.pdf
853K

MemoSuppDefMotSJ_Pleadings_03222012.pdf
920K

DefExpertWitDisc_Discovery_05012012.pdf
160K

Ritchie Eppink <ritchieeppink@idaholegalaid.org> Mon, May 7, 2012 at 3:24 PM
To: Jon Steele <JSteele@runftsteele.com>

Can we meet at 5p today at my office at Idaho Legal Aid? I'll have 45 mins then. -Ritchie

--
Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)
[Quoted text hidden]

FW: Renshaw v. Homecomings

Jon Steele <JSteele@runftsteele.com> Wed, May 9, 2012 at 5:48 PM
To: ritchieeppink@idaholegalaid.org

Mr. Eppink,

Please review the attached as part of your engagement

From: Kirstan Eberle [mailto:kmd@moffatt.com]
Sent: Wednesday, May 09, 2012 11:44 AM
To: Jon Steele
Cc: Matt McGee; Mike Roe
Subject: Renshaw v. Homecomings

Mr. Steele,

Please find attached a copy of the Second Affidavit of Matthew J. McGee that we delivered to your office yesterday afternoon in the Renshaw matter. The last page of Exhibit A was inadvertently left out of your copy. I apologize for the confusion.

Thank you,

Kirstan Eberle, ALS

Administrative Assistant to Michael W. McGreaham

& Matthew J. McGee

Moffatt Thomas Barrett Rock & Fields, Chtd.

101 S. Capitol Blvd., 10th floor | P.O. Box 829

Boise, ID 83701-0829

office 345.2000 | direct 385.5318 | fax 385.5384

www.moffatt.com

2431795_1_2012-05-08 Second Affidavit of Matthew J McGee.PDF
169K

Ritchie Eppink <ritchieeppink@idaholegalaid.org> Thu, May 10, 2012 at 7:30 AM
To: Jon Steele <JSteele@runftsteele.com>

Jon- I've attached my report. If you have any questions, please phone my mobile, as I will be in court and other meetings for the remainder of the day. -Ritchie

–
Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)
[Quoted text hidden]

report 2012-05-10 - renshaw.pdf
141K

Ritchie Eppink <ritchieeppink@idaholegalaid.org> Thu, May 10, 2012 at 7:38 AM
To: Jon Steele <JSteele@runftsteele.com>

For your information and records, I've attached the latest status of my time on this matter. -Ritchie
[Quoted text hidden]

time report 2012-05-10 - renshaw.pdf
8K

Ritchie Eppink <ritchieeppink@idaholegalaid.org> Thu, May 10, 2012 at 8:15 AM
To: Jon Steele <JSteele@runftsteele.com>

My apologies, but I neglected to include an important section of the report. I've attached a revised report. -Ritchie

On Thu, May 10, 2012 at 7:30 AM, Ritchie Eppink <ritchieeppink@idaholegalaid.org> wrote:
[Quoted text hidden]

report 2012-05-10 - renshaw.pdf
140K

Jon Steele <JSteele@runftsteele.com> Thu, May 10, 2012 at 9:58 AM
To: Ritchie Eppink <ritchieeppink@idaholegalaid.org>

Thank you for your assistance in this matter..

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Thursday, May 10, 2012 8:15 AM
To: Jon Steele
Subject: Re: FW: Renshaw v. Homecomings

[Quoted text hidden]

RE: 21 million dollar RESPA verdict- Renshaw v. MERS, Homecomings and Executive Trustee Services

4 messages

Jon Steele <JSteele@runftsteele.com> Tue, Apr 3, 2012 at 1:28 PM
To: ritchieeppink@idaholegalaid.org

My motion for SJ is not due until next Wednesday the 11th. Comments are appreciated..

From: Jon Steele
Sent: Thursday, March 29, 2012 5:13 PM
To: 'Ritchie Eppink'
Subject: RE: 21 million dollary RESPA verdict

Procrastination is bad. And I never met a lawyer who didn't push it to 4:59pm for his entry into the Courthouse.

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Thursday, March 29, 2012 5:10 PM
To: Jon Steele
Subject: Re: 21 million dollary RESPA verdict

Hey, don't call is procrasinating- if you're not cutting it close to your deadline, you're not doing enough work, right? /re

--
Richard Alan Eppink
Attorney at Law / Justice Architect
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(208) 342-2561 (fax)

On Thu, Mar 29, 2012 at 16:51, Jon Steele <JSteele@runftsteele.com> wrote:

Ritchie,

I appreciate whatever you can give me. And I apologize for being a fucking procrastinating lawyer.

Thank you very much.

Travel safely

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Thursday, March 29, 2012 4:36 PM

To: Jon Steele
Subject: Re: 21 million dollary RESPA verdict

Unfortunately, there's probably no way. I'm leaving early in the morning and won't be back until late Sunday. I've got jury instructions and briefing due on Monday.

If you want to send what you've got over, I'll take it on the road with me and give it a glance if I can. I wish I could make a promise to you, but under these circumstances I just can't.

-Ritchie
--
Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)

On Thu, Mar 29, 2012 at 16:24, Jon Steele <JSteele@runftsteele.com> wrote:

Monday, April 2

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Thursday, March 29, 2012 4:22 PM

To: Jon Steele
Subject: Re: 21 million dollary RESPA verdict

When do you need comments by? /re
--
Richard Alan Eppink
Attorney at Law / Justice Architect
IDAHO LEGAL AID SERVICES, INC.
310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)

On Thu, Mar 29, 2012 at 16:09, Jon Steele <JSteele@runftsteele.com> wrote:

Hi Ritchie,

Can I email you what I have and ask for your comments??

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Thursday, March 29, 2012 4:04 PM
To: Jon Steele
Subject: Re: 21 million dollary RESPA verdict

Jon- Can I give you a call next week about this, or have you got a deadline? I'm trying to get out of town but will make time to call you before that if you need to talk asap. /re

–

Richard Alan Eppink
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On Thu, Mar 29, 2012 at 15:16, Jon Steele <JSteele@runftsteele.com> wrote:

Hi Ritchie,

Just left a phone message for you.

I need to speak to the Architect of Justice..

From: Richard Alan Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Friday, July 01, 2011 2:34 PM

To: Jon Steele
Subject: RE: 21 million dollary RESPA verdict

Thanks, Jon- Here's what I think I can do in this timeline- I'm going to print these off and try to go through them over the weekend. I've also already put an email out for some stellar HAMP private right of action and MERS briefs to a select group of folks around the country who I know have done good work on these HAMP cases. If I've got any ideas for you by independence day, I'll try to share them- either on Monday or, if I'm still here, on Tuesday. Will you be available by phone on Monday (or maybe I should say- do you want to be??)

-Ritchie

From: Jon Steele [mailto:JSteele@runftsteele.com]

Sent: Friday, July 01, 2011 2:25 PM
To: Richard Alan Eppink
Subject: RE: 21 million dollary RESPA verdict

Ritchie,

Attached are the briefs. The additional briefing is due next Wednesday. I apologize for imposing on you.

Any assistance you can give is greatly appreciated.

Where are you going on vacation?

Jon M. Steele

Runft & Steele Law Offices, PLLC

1020 W. Main Street, Suite 400

Boise, ID 83702

(208) 333-9495

Fax: (208) 343-3246

JSteele@runftsteele.com

www.runftsteele.com

From: Richard Alan Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Friday, July 01, 2011 12:05 PM
To: Jon Steele
Subject: RE: 21 million dollary RESPA verdict

Jon- When is this next round of briefing due? And could you send me the briefs already in? I can look these over and then let's chat. I am ***supposed*** to leave for my first vacation in forever next Tuesday, but I've got a 7/7 hearing that for some reason won't go away, so we'll see. Point of all that is: if you can get those briefs to me today, there's a chance I might be able to get back to you Tuesday. Thanks, -Ritchie

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From: Jon Steele [mailto:JSteele@runftsteele.com]
Sent: Friday, July 01, 2011 6:48 AM
To: Richard Alan Eppink
Cc: Kahle Becker
Subject: RE: 21 million dollary RESPA verdict

Hi Ritchie,

Judge Williamson heard defendant's motion to dismiss on the pleadings. She has three questions that she wants briefing on:

1. What effect that MERS is simply referred to in the DOT and not a signatory?
2. Recent case law on MERS as the beneficiary
3. Does HAMP create a private cause of action?

Can you help me out by providing any recent decisions?

And I would like to list you as an expert witness.

I think I have Judge Williams' ear. This could be the Idaho test case.

Thanks. You have been a great source of info for me and I appreciate you sharing your knowledge.

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From: Richard Alan Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Thursday, March 24, 2011 9:07 AM
To: Jon Steele; Kahle Becker
Subject: 21 million dollary RESPA verdict

Jon, Kahle-

This just in- verdict from a Georgia jury from Monday on a RESPA case about failure to fix an incorrect $2,418 mortgage arrears-

$575 compensatory

$1,000,000 emotional distress

$20,000,000 punitive

$350,000 attorney fees

See complaint and verdict form attached. No citation for this case, so I hope you can open the attachments.

/re

–

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Ritchie Eppink <ritchieeppink@idaholegalaid.org> Tue, Apr 3, 2012 at 1:52 PM
To: Jon Steele <JSteele@runftsteele.com>

Okay- I haven't had a chance to read it yet, but I should have some time to do that before 4/11. -Ritchie

--
Richard Alan Eppink
Attorney at Law / Justice Architect
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310 North Fifth Street
Boise, Idaho 83702

(208) 345-0106, ext. 1503 (tel)
(208) 342-2561 (fax)

[Quoted text hidden]

Jon Steele <JSteele@runftsteele.com> Tue, Apr 3, 2012 at 3:00 PM
To: Ritchie Eppink <ritchieeppink@idaholegalaid.org>

Thanks

From: Ritchie Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Tuesday, April 03, 2012 1:52 PM
To: Jon Steele
Subject: Re: 21 million dollar RESPA verdict- Renshaw v. MERS, Homecomings and Executive Trustee Services

[Quoted text hidden]

Ritchie Eppink <ritchieeppink@idaholegalaid.org> Tue, Apr 10, 2012 at 5:27 PM
To: Jon Steele <JSteele@runftsteele.com>

Jon- I read the brief. Is Homecomings the entity trying to foreclose? And did I read the brief right on page 9 that Homecomings has admitted that it is not the current holder of the note and is not in possession of it?

If so, I think you only need a very short brief- that should be enough to halt the foreclosure.

-Ritchie

--
Richard Alan Eppink
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[Quoted text hidden]

Ritchie Eppink <ritchieeppink@idaholegalaid.org>

21 million dollary RESPA verdict

Richard Alan Eppink <ritchieeppink@idaholegalaid.org> Thu, Mar 24, 2011 at 9:07 AM
To: Jon Steele <JSteele@runftsteele.com>, Kahle Becker <kahle@kahlebeckerlaw.com>

Jon, Kahle-

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2 attachments

HSG MRTG respa 21 million - BrashComplaint.pdf
340K

HSG MRTG respa 21 million - brash verdict form.pdf
123K

Jon Steele <JSteele@runftsteele.com> Thu, Mar 24, 2011 at 1:54 PM
To: Richard Alan Eppink <ritchieeppink@idaholegalaid.org>, Kahle Becker <kahle@kahlebeckerlaw.com>

WOW

Thanks R

Jon M. Steele

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[Quoted text hidden]

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To: Richard Alan Eppink <ritchieeppink@idaholegalaid.org>
Cc: Kahle Becker <kahlebecker@gmail.com>

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Sent: Thursday, March 24, 2011 9:07 AM
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Subject: 21 million dollary RESPA verdict

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[Quoted text hidden]

Richard Alan Eppink <ritchieeppink@idaholegalaid.org> Fri, Jul 1, 2011 at 12:05 PM
To: Jon Steele <JSteele@runftsteele.com>

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To: Jon Steele

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[Quoted text hidden]

2 attachments

Response in Opposition to Defs' Mot for Jdgmt on Pleadings 06-23-11.doc
54K

MemoISMotionJudg_Pleadings_06162011.pdf
2928K

Richard Alan Eppink <ritchieeppink@idaholegalaid.org> Fri, Jul 1, 2011 at 2:33 PM
To: Jon Steele <JSteele@runftsteele.com>

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-Ritchie

From: Jon Steele [mailto:JSteele@runftsteele.com]
Sent: Friday, July 01, 2011 2:25 PM
To: Richard Alan Eppink

[Quoted text hidden]

[Quoted text hidden]

Richard Alan Eppink <ritchieeppink@idaholegalaid.org> Fri, Jul 1, 2011 at 2:44 PM
To: Jon Steele <JSteele@runftsteele.com>

Jon- In the meantime, here's something that might be interesting of helpful- a depo excerpt of one of the MERS "Vice Presidents" Also, look up In re Kemp, a New Jersey bankruptcy adversary proceeding- I don't have a cite handy, but if I remember it correctly it might be helpful to you. Sorry if not. /re

From: Jon Steele [mailto:JSteele@runftsteele.com]
Sent: Friday, July 01, 2011 2:25 PM
To: Richard Alan Eppink

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73 Notice of Filing of Supplemental Exhibit in Support 2nd MTD 06.21.11.pdf
770K

Jon Steele <JSteele@runftsteele.com> Fri, Jul 1, 2011 at 3:42 PM
To: Richard Alan Eppink <ritchieeppink@idaholegalaid.org>

Thanks Ritchie,

Sounds good. Yes, I am available on Monday. I will be in the office or you can reach me on my cell at 371-4000.

Thanks

Jon M. Steele

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From: Richard Alan Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Friday, July 01, 2011 2:34 PM

[Quoted text hidden]

[Quoted text hidden]

Richard Alan Eppink <ritchieeppink@idaholegalaid.org> Tue, Jul 5, 2011 at 11:23 AM
To: Jon Steele <JSteele@runftsteele.com>

Jon-

I did go through the briefs over the weekend. I made a few notes but unfortunately I left them in my other bag at home. If I get a chance later this evening I may add a little to what I say here.

Main two things are:

- You're probably going to lose on the HAMP private right of action issue. I don't think anybody's winning that.

- I'm attaching some really good stuff on MERS, and I'm sharing it with confidence that you will not distribute it further without talking with me about it first. One is an internal MERS document summarizing the MERS cases around the country. The rest are decisions, briefs, and other various things I've collected over the years on MERS.

I wish I could be a bigger help, but I just haven't had the time I thought I might (that seems to perpetually be the way of it...)

Please keep me posted on this case.

-Ritchie

--

Richard Alan Eppink

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From: Jon Steele [mailto:JSteele@runftsteele.com]
Sent: Friday, July 01, 2011 3:43 PM

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18 attachments

HSG FCLOSURE MERS state-by-state litigation Article_Atachment.pdf
413K

HAMP 3pb argument.pdf
72K

HAMP defense-side article McGarry_BFS_4_11.pdf
640K

HAMP enforceable throughs tate law claims - Bankr S.D. Cal. 2011 - Doble v Deutsche Bank.pdf
71K

HAMP no 3pb - Burtzos v. Countrywide Home Loans - Order Granting Dismissal - CA.pdf
23K

HSG FCLOSURE bk idaho mers 2007-09-04.pdf
198K

HSG FCLOSURE bk idaho mers 2009-03-12.pdf
190K

HSG FCLOSURE bk idaho mers 2009-03-31.pdf
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HSG FCLOSURE bk idaho mers 2009-07-07.pdf
204K

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176K

HSG FCLOSURE MERS bony v branche New York 2010-08.wpd
41K

HSG FCLOSURE MERS CaseLawOutlineMarch2011.pdf
5321K

Response in Opposition to Defs' Mot for Jdgmt on Pleadings 06-23-11.doc
54K

44 Defendant Martinez's Second Motion to Dismiss.pdf
460K

62 Notice of Filing Authority 05.09.11.pdf
413K

71 Notice of Filing Authority - MERS - BNY v. Silverberg 06.15.11.pdf
711K

73 Notice of Filing of Supplemental Exhibit in Support 2nd MTD 06.21.11.pdf
770K

MemoISMotionJudg_Pleadings_06162011.pdf
2928K

Richard Alan Eppink <ritchieeppink@idaholegalaid.org> Tue, Jul 5, 2011 at 11:37 AM
To: Jon Steele <JSteele@runftsteele.com>

Jon-

I just sent you a bunch of stuff as attachments. I fear you may not get them because of the problems we were having before with that. If you don't get them, I have burned them onto a CD available for pickup at the legal aid office at 310 N. 5th. I will be unavailable for most of the rest of today.

-Ritchie

--

Richard Alan Eppink

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[Quoted text hidden]

Jon Steele <JSteele@runftsteele.com> Tue, Jul 5, 2011 at 2:28 PM
To: Richard Alan Eppink <ritchieeppink@idaholegalaid.org>
Cc: TJ Wiggs <TWiggs@runftsteele.com>, Karissa Armbrust <KArmbrust@runftsteele.com>

Hi Ritchie,

Nope. Didn't come through. I will stop by to pick up.

Thank you very, very much for your assistance.

Jon M. Steele

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From: Richard Alan Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Tuesday, July 05, 2011 11:38 AM

[Quoted text hidden]

[Quoted text hidden]

Richard Alan Eppink <ritchieeppink@idaholegalaid.org> Mon, Aug 15, 2011 at 10:33 AM
To: Jon Steele <JSteele@runftsteele.com>

Jon- Did you ever get a decision in your Renshaw case? I'd be interested to see it if so. Thanks, -Ritchie

--

Richard Alan Eppink

Attorney at Law / Justice Architect

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From: Jon Steele [mailto:JSteele@runftsteele.com]
Sent: Tuesday, July 05, 2011 2:29 PM
To: Richard Alan Eppink
Cc: TJ Wiggs; Karissa Armbrust

[Quoted text hidden]

[Quoted text hidden]

Jon Steele <JSteele@runftsteele.com> Mon, Aug 15, 2011 at 12:12 PM
To: Richard Alan Eppink <ritchieeppink@idaholegalaid.org>

Hi Ritchie,

Yes. Came in last week and is attached. I would like to get together with you on strategy.

Jon M. Steele

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From: Richard Alan Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Monday, August 15, 2011 10:33 AM

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[Quoted text hidden]

MemoDecMotJudg_Order_08102011.pdf
339K

Richard Alan Eppink <ritchieeppink@idaholegalaid.org> Wed, Aug 24, 2011 at 3:09 PM
To: Jon Steele <JSteele@runftsteele.com>

Jon- Check this decision out (attached). Fresh from my legal aid colleague Mike McCarthy in TF. /re

--

Richard Alan Eppink

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From: Jon Steele [mailto:JSteele@runftsteele.com]
Sent: Monday, August 15, 2011 12:13 PM

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[Quoted text hidden]

HSG FCLOSURE MERS ralph 2011.pdf
455K

Jon Steele <JSteele@runftsteele.com> Wed, Aug 24, 2011 at 4:58 PM
To: Richard Alan Eppink <ritchieeppink@idaholegalaid.org>
Cc: John Runft <JRunft@runftsteele.com>

WOW!! Congrats to you and Michael. A very correct ruling.

Jon M. Steele

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From: Richard Alan Eppink [mailto:ritchieeppink@idaholegalaid.org]
Sent: Wednesday, August 24, 2011 3:10 PM

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Jon- Can I give you a call next week about this, or have you got a deadline? I'm trying to get out of town but will make time to call you before that if you need to talk asap. /re

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Monday, April 2

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Gmail by Google

Ritchie Eppink <eppink@gmail.com>

Invoice #001 re Renshaw v. MERS

Inbox

Ritchie Eppink <ritchie@eppink.org> Fri, May 25, 2012 at 12:41 PM
To: jsteele@runftsteele.com

Jon- As you requested earlier today, here is the first invoice for my work re: the Renshaw matter. Please let me know if you have any questions. -Ritchie

renshaw invoice 001.pdf
26K

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual, Plaintiff, vs. HOMECOMINGS FINANCIAL, LLC, a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware Limited Liability Company; DOES I-V, and ABC CORPORATIONS I-V, Defendants.	CASE NO. CV OC 1023898 **BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION**

I

INTRODUCTION

Renshaw respectfully requests this Court to reconsider its Decision and Order re: Summary Judgment as there are genuine issues of material facts precluding summary judgment in Defendant's favor.

Renshaw is not attacking, in the words of the Court, the "[s]habby, dishonest tactics by mortgage lenders [which] have brought the United States' economy into serious financial crisis and have left many people with crushing obligations which they can little afford, have reduced the value of virtually every homeowner's home, left many communities seriously damaged and, as the shabby, sub-prime loans and the foreclosures resulting from them work their way through the system, have badly damaged the financial interests of most Americans." Decision and Order re: Summary Judgment, p. 6.

Renshaw is attacking the shabby, dishonest tactics used by Defendant in foreclosing his crushing obligation. The facts of this case lead Renshaw and hopefully this Court to conclude that MERS cannot be the beneficiary of Renshaw's Deed of Trust. The true beneficiary did not initiate this foreclosure.

Renshaw's argument is that MERS has no substantive right to foreclose or attempt to foreclose the Renshaw Deed of Trust. Based upon Defendant's admissions and interrogatory responses, MERS agrees. *See*, Affidavit of Steele in Support of Plaintiff's Motion for Reconsideration, Exhibit 16.

Renshaw has not contended that his Note and Deed of Trust are void or otherwise unenforceable. In the words of this Court, Renshaw "...got a terrible deal." Decision and Order re: Summary Judgment, p. 6. Yes, he did get a terrible deal, but he did execute the Note and Deed of Trust and has never denied that.

Renshaw requests this Court address the issue of the absence of substantive rights held by MERS before the Court grants summary judgment to MERS. MERS does not have and does not claim to have any substantive rights in Renshaw's Note and Deed of Trust. *See*, Affidavit of Steele in Support of Plaintiff's Motion for Reconsideration, Exhibit 16. This Court states that ...

"[t]here is no legal basis nor is there any Idaho legal authority for the proposition that the beneficiary of a Deed of Trust is subject to liability in tort or in contract for utilizing the non-judicial foreclosure process provided for by I.C. § 45-1505 nor has the Plaintiff articulated any reasonable basis for this Court to recognize some new claim." Decision and Order re: Summary Judgment, p. 7. Renshaw's claim is that to properly utilize the non-judicial foreclosure process, the foreclosure must be initiated by the true beneficiary. MERS, for a number of reasons is not and cannot be the beneficiary of Renshaw's Deed of Trust.

II

STANDARD OF REVIEW

The mere fact that both Plaintiff and Defendant have moved for summary judgment does not establish that there is no genuine issue of material fact. Renshaw's Motion must be evaluated on its own merits, its own facts, and its own legal theories.

In *Intermountain Forest Mgmt., Inc. v. Louisiana Pac. Corp.*, 136 Idaho 233, 31 P.3d 921 (2001) the Idaho Supreme Court held that where the parties have filed cross-motions for summary judgment relying on the same facts, issues and theories, the parties effectively stipulate that there is no genuine issue of material fact that would preclude the district court from entering summary judgment; **however, the mere fact that both parties move for summary judgment does not in and of itself establish that there is no genuine issue of material fact.** The Court further found that when parties have filed cross-motions for summary judgment the applicable standard of review does not change, and the Supreme Court must evaluate each party's motion on its own merits. *See, McFadden v. Sein*, 139 Idaho 921, 88 P.3d 740 (2004) for the same propositions.

If the case is to be tried by the court without a jury, where cross-motions for summary judgment are filed, based upon the same evidentiary facts and upon the same theories and issues, the parties effectively have stipulated that no genuine issues of material fact exist. *Zollinger v. Carrol*, 137 Idaho 397, 399, 49 P.3d 402, 404 (2002) (citing *Riverside Development Co. v. Ritchie,* 103 Idaho 515, 518 n. 1, 650 P.2d 657, 660 n. 1 (1982)). But such is not the case. Renshaw's evidentiary facts and legal theories are not the same as those advanced by MERS.

The Court in *E. Idaho Agr. Credit Ass'n v. Neibaur*, 130 Idaho 623, 944 P.2d 1386 (1997) cited to the earlier *Wells* case:

> In *Wells v. Williamson,* 118 Idaho 37, 794 P.2d 626 (1990), this Court recognized that when opposing parties file cross motions for summary judgment, based upon different theories, the parties should not be considered to have effectively stipulated that there is no genuine issue of material fact. *Wells,* 118 Idaho at 40, 794 P.2d at 629.

E. Idaho Agr. Credit Ass'n v. Neibaur, 130 Idaho 623, 626, 944 P.2d 1386, 1389 (1997).

The Idaho Supreme Court has stated the following:

> We have held that the filing of cross-motions for summary judgment by opposing parties does not in itself establish that there is no genuine issue of material fact. This is particularly so when the opposing motions seek summary judgment based upon different issues or theories dependent on a different set of material facts. Where the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences. In order to determine whether either party is entitled to summary judgment, this Court must examine each motion separately, reviewing the record and the reasonable inferences that can be drawn from it in favor of each party's opposition to the motions for summary judgment.

First Sec. Bank of Idaho, N.A. v. Murphy, 131 Idaho 787, 790, 964 P.2d 654, 657 (1998) (citations omitted).

III

ISSUES OF MATERIAL FACT

The genuine issues of material fact that preclude summary judgment in MERS favor are the following:

1. Whether or not MERS is the beneficiary of Renshaw's Deed of Trust:
   a. MERS was never intended to be the foreclosing entity of Renshaw's Deed of Trust.
   b. MERS has no economic interest in Renshaw's Note or Deed of Trust.
   c. MERS has no recognized legal or statutory interest in Renshaw's Note or Deed of Trust.
2. Whether or not Kahn's expert report and testimony that Renshaw's obligation has been paid in full are admissible and unrebutted.
3. Whether or not an accurate accounting would evidence payment in full of Mr. Renshaw's Note.
4. Whether or not Renshaw is entitled to production of the securitization papers which were the subject of his Motion to Compel filed on April 20, 2012.
5. Whether or not Renshaw is entitled to rulings on pending motions.

IV

ADDITIONAL EVIDENCE SUBMITTED BY RENSHAW

In support of his Motion for Reconsideration, Renshaw has submitted the Affidavit of Steele in Support of Plaintiff's Motion for Reconsideration filed on August 8, 2012. This Affidavit includes several matters not previously made a part of the Court's record. These matters include the following:

a. Exhibit 32 - Video Deposition of R.K. Arnold, taken September 25, 2009, which is the subject of Renshaw's Second Request for Judicial Notice filed April 20, 2012.

b. Exhibit 34 - Deposition of Heidi Emery taken May 8, 2012.

c. Exhibit 36 - Deposition of Richard Kahn taken on June 12, 2012.

d. Exhibit 37 - Supplemental Disclosures to the expert report of Richard Kahn.

e. Exhibit 40 - US District Court for the District of Oregon's Judge Panner's Order in the case of *Hooker v. Northwest Trustee Services, Inc., et al.*, Case No. 10-3111-PA, dated May 25, 2011.

f. Exhibit 41 - United States Court of Appeals for the Ninth Circuit Brief of Amicus Curiae State of Oregon, Supporting Appellees' Brief and Affirmance of the District Court's Judgment, No. 11-35534, in the case of *Hooker v. Northwest Trustee Services, Inc.,* dated March 27, 2012.

g. Exhibit 42 - "Exhibit A" to United States Court of Appeals for the Ninth Circuit, No. 11-35534, in the case of *Hooker v. Northwest Trustee Services, Inc.,* dated July 26, 2012, Order Accepting Certified Question, in the Supreme Court of the State of Oregon, *Brandrup v. Reconstrust Company, N.A., et al.*

On August 20, 2012, Renshaw submitted the Second Affidavit of Steele in Support of Motion for Reconsideration. This Affidavit includes the deposition of Mr. Ritchie Eppink not previously made a part of the Court's record.

The Third Affidavit of Steele in Support of Motion for Reconsideration is submitted with this Brief and includes as Exhibit 44 the recent Washington Supreme Court case concerning the status of MERS as a beneficiary and excerpts from Mr. Kahn's deposition as Exhibit 45.

V

RECENT OREGON AND WASHINGTON SUPREME COURT DECISIONS

The issues before the Court in this case are being resolved in other states.

Exhibit 42 is the Oregon Supreme Court's July 26, 2012, acceptance of four certified questions from the United States District Court for the District of Oregon and from the United States Court of Appeals for the Ninth Circuit. The four questions to be answered by the Oregon Supreme Court are the following:

1. May an entity such as MERS, that is neither a lender nor successor to a lender, be a "beneficiary" as the term is used in the Oregon Trust Deed Act?

2. May MERS be designated as beneficiary under the Oregon Trust Deed Act where the trust deed provides the MERS "holds only the legal title to the interests granted by Borrower in the Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests?

3. Does the transfer of a promissory note from the lender to a successor result in an automatic assignment of the securing trust deed that must be recorded prior to the commencement of nonjudicial foreclosure proceedings under ORS 86.735(1)?

4. Does the Oregon Trust Deed Act allow MERS to retain and transfer legal title to a trust deed as nominee for the lender, after the note

> secured by the trust deed is transferred from the lender to a successor or series of successors?

On August 16, 2012, the Supreme Court of Washington answered a question which had been certified to it by the U.S. District Court for the Western District of Washington. For a number of reasons the Washington Supreme Court answered that MERS is an ineligible "beneficiary" within the terms of the Washington Deed of Trust Act, if it never held the promissory note or other debt instrument secured by the deed of trust. *Bain v. Metropolitan Mortgage Group, Inc., et al*, 2012 WL 3517326 (Supreme Court of Washington, August 16, 2012), copy attached as Exhibit 44 to the Third Affidavit of Jon M. Steele In Support of Plaintiff's Motion for Reconsideration.

VI

MERSCORP, INC. ACKNOWLEDGES IT IS SUBJECT TO STATE LAW

The deposition of R.K. Arnold, President and CEO of MERSCORP, Inc., taken on September 25, 2009, is the subject of Plaintiff's Second Request for Judicial Notice and is also attached as Exhibit 32 to the Affidavit of Steele in Support of Plaintiff's Motion for Reconsideration. In his deposition, Mr. Arnold explicitly states that MERS is subject to all state laws:

> Q. So irrespective of the fact that you grant them the right to change the name on the lien out of your name, they still need the legal right to do it based on the documents that underlie that registration?
>
> A. Yes. And under state law.
>
> Page 232, Lines 3-8,
> *Video Deposition of R.K. Arnold*, 09-25-2009

A. Our grant of authority for certifying officer would at all moments be subject and subordinate to state law.

Page 232, Lines 15-17,
Video Deposition of R.K. Arnold, 09-25-2009

A. Everything is subordinate to state law.

Page 233, Line 6,
Video Deposition of R.K. Arnold, 09-25-2009

Q. Right. Well, your... the power you grant to GMAC is based upon the premise that they have the underlying right under state law to do what they claim to be doing in you name by the grant of that power?

A. True.

Q. The grant of the power from you does not supersede the state law requirement that they have the right to take that action independently of your relationship with them?

A. True.

Page 233, Lines 17-23; Page 234, Lines 1-5,
Video Deposition of R.K. Arnold, 09-25-2009

VII

KAHN TESTIMONY THAT RENSHAW'S NOTE HAS BEEN PAID IN FULL

Mr. Kahn's testimony is that Renshaw's obligation has been securitized. When Renshaw's loan was securitized it was sold and pooled into a Mortgage Backed Security Trust or REMIC. This trust, the true owner of Renshaw's obligation, is governed by certain operative documents that dictate the actions of any and all agents for the trust, their powers and how they

may act on behalf of the trust.

The REMIC structure was created in the 1986 amendments to the IRS tax code. A REMIC trust has a special tax status with the Internal Revenue Service that allows the cash flow on the pools of loans to "pass through" to the individual certificate holders, thereby avoiding double taxation on the cash flow—a significant profit advantage for the investors of that trust that translates into millions of dollars in taxes saved.

A REMIC trust has absolutely no power to act outside of the power and authority vested in it by the trust documents. The governing documents for a REMIC trust are the Prospectus, Pooling and Servicing Agreement, and the Mortgage Loan Purchase Agreement.

These documents, when provided by Defendant, will verify that Renshaw's loan was assigned to a REMIC trust without recourse.

The only entity that can transfer Renshaw's loan is this REMIC trust. If the REMIC trust has transferred Renshaw's obligation to another entity, it is likely that the entire REMIC trust would lose its tax status and possibly subject all cash flow received by this trust to double taxation.

Kahn's testimony that Renshaw's obligation has been securitized is unrebutted. Kahn's testimony that Renshaw's Note and Deed of Trust have been paid in full is more fully explained in his deposition at pages 26-27, 36 and 52, attached to the Third Affidavit of Jon M. Steele in Support of Plaintiff's Motion for Reconsideration as Exhibit 2 filed herewith.

Renshaw's obligation has been paid through multiple transfers and payments made by other entities which include credit default swaps and other undisclosed payments.

Production of the securitization documents will establish payment of Renshaw's obligation. The Court is directed to Kahn's deposition testimony specifically pages 10, 12, 15,

16, 17, 19, 23, 25, 26, 27, 30, and 45 attached to the Third Affidavit of Steele in Support of Plaintiff's Motion for Reconsideration, Exhibit 45. Kahn's unrebutted testimony is that Renshaw's loan has been securitized, paid in full, and that the papers submitted to this Court are false and fabricated.

Renshaw does not contend that he had paid off his Note. Renshaw's contention is that through many, many undisclosed transfers and payments made by other entities Renshaw's Lender and all of its successors have been paid in full.

VIII

RENSHAW IS ENTITLED TO PRODUCTION OF THE SECURITIZATION PAPERS.

Renshaw believes this Court erred by granting Defendant summary judgment without ruling on Renshaw's Motion to Compel the securitization papers. *See*, *Merrifield v. Arave*, 128 Idaho 306, 311, 912 P.2d 674, 679 (1996) and cases cited therein; *see also, Ketterling v. Burger King Corporation*, p. 10 (2012 Opinion No. 40, filed March 2, 2012).

The securitization papers of Renshaw's Deed of Trust are critical evidence in established Renshaw's claims. The stonewalling refusal to produce those papers cannot be tolerated by this Court. Renshaw's loan was securitized. The record clearly establishes this fact.

IX

RENSHAW IS ENTITLED TO AN ACCOUNTING

Section 22 of the Renshaw Deed of Trust provides that Renshaw has the right to bring a court action to assert the non-existence of a default or any other defense to acceleration and sale.

Renshaw contends that an accurate accounting (which would also reveal all transfers,

assignments, credit default swaps, insurance proceeds and other payments made on Renshaw's Note) will prove the non-existence of a default and that his obligation has been paid in full.

X

RENSHAW REQUESTS THE COURT RULE UPON THE PENDING MOTIONS

Renshaw respectfully requests the Court's ruling on these Motions:

1. Motion for Ruling on Defendant's Motion to Strike Certain Proposed Summary Judgment Evidence;
2. Motion for Ruling on Defendant's Motion to Strike Expert Report and Testimony of Ritchie Eppink
3. Motion for Ruling on Defendant's Motion to Strike Report and Testimony of Dr. McMartin
4. Motion for Ruling on Defendant's Motion to Strike Report and Testimony of Richard Kahn
5. Motion for Ruling on Defendant's Motion to Withdraw or Amend Admissions
6. Motion for Ruling on Plaintiff's Request for Punitive Damages
7. Motion for Ruling on Plaintiff's First Request for Judicial Notice
8. Motion for Ruling on Plaintiff's Second Request for Judicial Notice
9. Motion for Ruling on Plaintiff's Third Request for Judicial Notice
10. Motion for Ruling on Plaintiff's Motion to Change Caption
11. Motion for Ruling on Plaintiff's Motion to Compel

12. Motion for Ruling on Plaintiff's Motion to Determine Sufficiency of Defendant's Objections to Plaintiff's Requests for Admission

XI

CONCLUSION

Renshaw respectfully requests this Court to reconsider its grant of Summary Judgment to Defendant and, after careful reconsideration, this matter be scheduled for a jury trial.

DATED this 6th day of September 2012.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of September 2012, a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION** was served upon opposing counsel as follows:

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual, Plaintiff, vs. HOMECOMINGS FINANCIAL, LLC, a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware Limited Liability Company; DOES I-V, and ABC CORPORATIONS I-V, Defendants.	CASE NO. CV OC 1023898 **THIRD AFFIDAVIT OF STEELE IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION**

STATE OF IDAHO)
:ss
County of Ada)

COMES NOW, Jon M. Steele, being over the age of eighteen years and competent to make this Affidavit, after first being duly sworn, and upon his own personal knowledge, states as follows:

1. I am an attorney in good standing with the Idaho State Bar and counsel for Plaintiff herein.
2. I make this Affidavit in support of Plaintiff's Motion for Reconsideration.
3. Attached as Exhibit 44 is a true and correct copy of the case *Bain v. Metropolitan Mortgage Group, Inc.*, 2012 WL 3517326 (Supreme Court of Washington, August 16, 2012).
4. Attached as Exhibit 45 are excerpts from the deposition of Richard Kahn taken on June 12, 2012.

Further, your affiant sayeth naught.

DATED this 6th day of September 2012.

RUNFT & STEELE LAW OFFICE, PLLC

By: _____
JON M. STEELE
Attorney for Plaintiff

STATE OF IDAHO)
:ss
County of Ada)

SUBSCRIBED AND SWORN unto me this 6th day of September 2012.

KARISSA R. ARMBRUST NOTARY PUBLIC STATE OF IDAHO

_____
Notary Public for the State of Idaho
Residing at: Nampa
My Commission Expires: 3-19-13

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of September 2012, a true and correct copy of the foregoing **THIRD AFFIDAVIT OF JON M. STEELE IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION** was served upon opposing counsel as follows:

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RUNFT & STEELE LAW OFFICES, PLLC

By: J M Steele
JON M. STEELE
Attorney for Plaintiff

Exhibit 44

2012 WL 3517326
Only the Westlaw citation is currently available.
Supreme Court of Washington.

Kristin BAIN, Plaintiff,
v.
METROPOLITAN **MORTGAGE** GROUP, INC., Indymac Bank, FSB; **Mortgage Electronics** Registration Systems; Regional Trustee Service; Fidelity National Title; and Doe Defendants 1 through 20, inclusive, Defendants.
Kevin Selkowitz, an individual, Plaintiff,
v.
Litton Loan Servicing, LP, a Delaware limited partnership; New Century **Mortgage** Corporation, a California corporation; Quality Loan Service Corporation of Washington, a Washington corporation; First American Title Insurance Company, a Washington corporation; **Mortgage Electronic** Registration Systems, Inc., a Delaware corporation; and Doe Defendants 1 through 20, Defendants.

Nos. 86206–1, 86207–9. | Aug. 16, 2012.

Synopsis

Background: After corporation that maintained a private **electronic** registration system for tracking ownership of **mortgage**-related debt appointed trustees who initiated foreclosure proceedings, the United States District Court, Western District of Washington, John C. Coughenour, J., certified questions to state Supreme Court.

Holdings: The Supreme Court, Chambers, J., held that:
[1] corporation was not lawful beneficiary pursuant to Deed of Trust Act;
[2] lender's nomination of corporation as nominee did not give rise to agency relationship with noteholders;
[3] acting as beneficiary was deceptive practice sufficient to support Consumer Protection Act (CPA) action; and
[4] acting as beneficiary had public interest impact sufficient to support CPA action.

Questions answered.

West Headnotes (19)

[1] **Federal Courts**
Withholding Decision; Certifying Questions
The decision whether to answer a certified question is within the discretion of the court.

[2] **Federal Courts**
Withholding Decision; Certifying Questions
The Supreme Court treats a certified question as a pure question of law and reviews de novo.

[3] **Mortgages**
Under **Mortgages** in General
A **mortgage** creates nothing more than a lien in support of the debt which it is given to secure.

[4] **Mortgages**
Right to Foreclose
Mortgages
Under Trust Deed
Mortgages
Execution of Power and Conduct of Sale in General
When secured by a deed of trust that grants the trustee the power of sale if the borrower defaults on repaying the underlying obligation, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision. West's RCWA 7.28.230(1), 61.12.090, 61.24.020.

[5] **Mortgages**
Rights, Duties and Liabilities of Trustee in General
A trustee is not merely an agent for the lender or the lender's successors, rather, trustees have obligations to all of the parties to a deed, including the homeowner. West's RCWA 61.24.010(4).

[6] **Mortgages**

EXHIBIT 44
003300

Statutory Provisions

The Deed of Trust Act should be construed to further three basic objectives: (1) the nonjudicial foreclosure process should remain efficient and inexpensive; (2) the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure; and (3) the process should promote the stability of land titles. West's RCWA 61.24.010 et seq.

[7] **Mortgages**
Under Trust Deed

Mortgages
Appointment of New Trustee

Corporation that maintained a private **electronic** registration system for tracking ownership of **mortgage**-related debt, but never held the promissory note secured by the deed of trust, was not a lawful beneficiary within the terms of the Deed of Trust Act with the power to appoint trustees to initiate foreclosure proceedings; Act defined a "beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." West's RCWA 61.24.005(2).

1 Cases that cite this headnote

[8] **Statutes**
Statutes Relating to the Same Subject Matter in General

The Supreme Court looks to related statutes to determine the meaning of statutory terms.

[9] **Mortgages**
Dealings and Transactions Between Parties

Mortgages
Under Trust Deed

Mortgages
Appointment of New Trustee

Lender's nomination of corporation that maintained a private **electronic** registration system for tracking ownership of **mortgage**-related debt as a nominee did not give rise to an agency relationship with successor noteholders so as to have authority to appoint trustee to initiate foreclosure proceeding; corporation failed to identify the entities that were purportedly controlled and were accountable for corporation's actions.

[10] **Principal and Agent**
Nature of the Relation in General

Agency requires a specific principal that is accountable for the acts of its agent.

[11] **Constitutional Law**
Policy

The legislature, not the Supreme Court, is in the best position to assess policy considerations.

[12] **Antitrust and Trade Regulation**
Nature and Elements

To prevail on a Consumer Protection Act (CPA) action, the plaintiff must show: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. West's RCWA 19.86.090.

[13] **Antitrust and Trade Regulation**
Fraud; Deceit; Knowledge and Intent

To prove that an act or practice is deceptive for purposes of a Consumer Protection Act (CPA) action, neither intent nor actual deception is required. West's RCWA 19.86.090.

[14] **Antitrust and Trade Regulation**
Fraud; Deceit; Knowledge and Intent

The question when determining whether an act or practice is deceptive for purposes of a Consumer Protection Act (CPA) action is whether the conduct has the capacity to deceive a substantial portion of the public. West's RCWA 19.86.090.

[15] **Antitrust and Trade Regulation**
Fraud; Deceit; Knowledge and Intent

Antitrust and Trade Regulation
Representations, Assertions, and Descriptions in General

Antitrust and Trade Regulation
Omissions and Other Failures to Act in General; Disclosure

Under the Consumer Protection Act (CPA), even accurate information may be deceptive if there is a representation, omission or practice that is likely to mislead. West's RCWA 19.86.090.

[16] **Antitrust and Trade Regulation**
Representations, Assertions, and Descriptions in General

Antitrust and Trade Regulation
Omissions and Other Failures to Act in General; Disclosure

Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the Consumer Protection Act (CPA). West's RCWA 19.86.090.

[17] **Appeal and Error**
Cases Triable in Appellate Court

Whether particular actions are deceptive under the Consumer Protection Act (CPA) is a question of law that the Supreme Court reviews de novo. West's RCWA 19.86.090.

[18] **Antitrust and Trade Regulation**
Practices Prohibited or Required in General

Appointment of trustee to initiate foreclosure proceeding by corporation that maintained a private **electronic** registration system for tracking ownership of **mortgage**-related debt, but never held the promissory note secured by the deed of trust, in violation of the Deed of Trust Act constituted deception sufficient to support a Consumer Protection Act (CPA) action by mortgagor. West's RCWA 19.86.090, 61.24.005(2).

[19] **Antitrust and Trade Regulation**
Public Impact or Interest; Private or Internal Transactions

Appointment of trustee to initiate foreclosure proceeding by corporation that maintained a private **electronic** registration system for tracking ownership of **mortgage**-related debt, but never held the promissory note secured by the deed of trust, in violation of the Deed of Trust Act had a public interest impact sufficient to support a Consumer Protection Act (CPA) action by mortgagor, where corporation was involved with an enormous number of **mortgages** in the country, perhaps as many as half nationwide. West's RCWA 19.86.010 et seq.

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Opinion

CHAMBERS, J.

*1 ¶ 1 In the 1990s, the **Mortgage Electronic** Registration System Inc. (MERS) was established by several large players in the **mortgage** industry. MERS and its allied corporations maintain a private **electronic** registration system for tracking ownership of **mortgage**-related debt. This system allows its users to avoid the cost and inconvenience of the traditional public recording system and has facilitated a robust secondary market in **mortgage** backed debt and securities. Its customers include lenders, debt servicers, and financial institutes that trade in **mortgage** debt and **mortgage** backed securities, among others. MERS does not merely track ownership; in many states, including our own, MERS is frequently listed as the "beneficiary" of the deeds of trust that secure its customers' interests in the homes securing the debts. Traditionally, the "beneficiary" of a deed of trust is the lender who has loaned money to the homeowner (or other real property owner). The deed of trust protects the lender by giving the lender the power to nominate a trustee and giving that trustee the power to sell the home if the homeowner's debt is not paid. Lenders, of course, have long been free to sell that secured debt, typically by selling the promissory note signed by the homeowner. Our deed of trust act, chapter 61.24 RCW, recognizes that the beneficiary of a deed of trust at any one time might not be the original lender. The act gives subsequent holders of the debt the benefit of the act by defining "beneficiary" broadly as "the holder of the instrument or document evidencing the obligations secured by the deed of trust." RCW 61.24.005(2).

¶ 2 Judge John C. Coughenour of the Federal District Court for the Western District of Washington has asked us to answer three certified questions relating to two home foreclosures pending in King County. In both cases, MERS, in its role as the beneficiary of the deed of trust, was informed by the loan servicers that the homeowners were delinquent on their **mortgages**. MERS then appointed trustees who initiated foreclosure proceedings. The primary issue is whether MERS is a lawful beneficiary with the power to appoint trustees within the deed of trust act if it does not hold the promissory notes secured by the deeds of trust. A plain reading of the statute leads us to conclude that only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property. Simply put, if MERS does not hold the note, it is not a lawful beneficiary.

¶ 3 Next, we are asked to determine the "legal effect" of MERS not being a lawful beneficiary. Unfortunately, we conclude we are unable to do so based upon the record and argument before us.

¶ 4 Finally, we are asked to determine if a homeowner has a Consumer Protection Act (CPA), chapter 19.86 RCW, claim based upon MERS representing that it is a beneficiary. We conclude that a homeowner may, but it will turn on the specific facts of each case.

FACTS

*2 ¶ 5 In 2006 and 2007 respectively, Kevin Selkowitz and Kristin Bain bought homes in King County. Selkowitz's deed of trust named First American Title Company as the trustee, New Century **Mortgage** Corporation as the lender, and MERS as the beneficiary and nominee for the lender. Bain's deed of trust named IndyMac Bank FSB as the lender, Stewart Title Guarantee Company as the trustee, and, again, MERS as the beneficiary. Subsequently, New Century filed for bankruptcy protection, IndyMac went into receivership, [1] and both Bain and Selkowitz fell behind on their **mortgage** payments. In May 2010, MERS, in its role as the beneficiary of the deeds of trust, named Quality Loan Service Corporation as the successor trustee in Selkowitz's case, and Regional Trustee Services as the trustee in Bain's case. A few weeks later the trustees began foreclosure proceedings. According to the attorneys in both cases, the assignments of the promissory notes were not publically recorded. [2]

¶ 6 Both Bain and Selkowitz sought injunctions to stop the foreclosures and sought damages under the Washington CPA, among other things. [3] Both cases are now pending in Federal District Court for the Western District of Washington. *Selkowitz v. Litton Loan Servicing, LP,* No. C10–05523–JCC, 2010 WL 3733928 (W.D.Wash. Aug. 31, 2010) (unpublished). Judge Coughenour certified three questions of state law to this court. We have received amici briefing in support of the plaintiffs from the Washington State attorney

general, the National Consumer Law Center, the Organization United for Reform (OUR) Washington, and the Homeowners' Attorneys, and amici briefing in support of the defendants from the Washington Bankers Association (WBA).

CERTIFIED QUESTIONS

1. Is **Mortgage Electronic** Registration Systems, Inc., a lawful "beneficiary" within the terms of Washington's Deed of Trust Act, Revised Code of Washington section 61.24.005(2), if it never held the promissory note secured by the deed of trust? [Short answer: No .]

2. If so, what is the legal effect of **Mortgage Electronic** Registration Systems, Inc., acting as an unlawful beneficiary under the terms of Washington's Deed of Trust Act? [Short answer: We decline to answer based upon what is before us.]

3. Does a homeowner possess a cause of action under Washington's Consumer Protection Act against **Mortgage Electronic** Registration Systems, Inc., if MERS acts as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?

[Short answer: The homeowners may have a CPA action but each homeowner will have to establsih the elements based upon the facts of that homeowner's case.]

Order Certifying Question to the Washington State Supreme Ct. (Certification) at 3–4.

ANALYSIS

[1] [2] ¶ 7 "The decision whether to answer a certified question pursuant to chapter 2.60 RCW is within the discretion of the court." *Broad v. Mannesmann Anlagenbau, A. G.,* 141 Wash.2d 670, 676, 10 P.3d 371 (2000) (citing *Hoffman v. Regence Blue Shield,* 140 Wash.2d 121, 128, 991 P.2d 77 (2000)). We treat the certified question as a pure question of law and review de novo. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,* 149 Wash.2d 660, 670, 72 P.3d 151 (2003) (citing *Rivett v. City of Tacoma,* 123 Wash.2d 573, 578, 870 P.2d 299 (1994)).

Deeds of Trust

*3 ¶ 8 Private recording of **mortgage**-backed debt is a new development in an old and long evolving system. We offer a brief review to put the issues before us in context.

¶ 9 A **mortgage** as a mechanism to secure an obligation to repay a debt has existed since at least the 14th century. 18 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Transactions § 17. 1, at 253 (2d ed.2004). Often in those early days, the debtor would convey land to the lender via a deed that would contain a proviso that if a promissory note in favor of the lender was paid by a certain day, the conveyance would terminate. *Id.* at 254. English law courts tended to enforce contracts strictly; so strictly, that equity courts began to intervene to ameliorate the harshness of strict enforcement of contract terms. *Id.* Equity courts often gave debtors a grace period in which to pay their debts and redeem their properties, creating an "equitable right to redeem the land during the grace period." *Id.* The equity courts never established a set length of time for this grace period, but they did allow lenders to petition to "foreclose" it in individual cases. *Id.* "Eventually, the two equitable actions were combined into one, granting the period of equitable redemption and placing a foreclosure date on that period." *Id.* at 255 (citing George E. Osborne, Handbook on the Law of **Mortgages** §§ 1–10 (2d ed.1970)).

[3] ¶ 10 In Washington, "[a] **mortgage** creates nothing more than a lien in support of the debt which it is given to secure." *Pratt v. Pratt,* 121 Wash. 298, 300, 209 P. 535 (1922) (citing *Gleason v. Hawkins,* 32 Wash. 464, 73 P. 533 (1903)); *see also* 18 Stoebuck & Weaver, *supra,* § 18.2, at 305. **Mortgages** come in different forms, but we are only concerned here with **mortgages** secured by a deed of trust on the **mortgaged** property. These deeds do not convey the property when executed; instead, "[t]he statutory deed of trust is a form of a **mortgage**." 18 Stoebuck & Weaver, *supra,* § 17.3, at 260. "More precisely, it is a three-party transaction in which land is conveyed by a borrower, the 'grantor,' to a 'trustee,' who holds title in trust for a lender, the 'beneficiary,' as security for credit or a loan the lender has given the borrower." *Id.* Title in the property pledged as security for the debt is not conveyed by these deeds, even if "on its face the deed conveys title to the trustee, because it shows that it is given as security for an obligation, it is an equitable **mortgage**." *Id.* (citing Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 1.6 (4th ed.2001)).

[4] [5] ¶ 11 When secured by a deed of trust that grants the trustee the power of sale if the borrower defaults on

repaying the underlying obligation, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision. *Id.* at 260–61; RCW 61.24.020; RCW 61.12.090; RCW 7.28.230(1). This is a significant power, and we have recently observed that "the [deed of trust] Act must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales." *Udall v. T.D. Escrow Servs., Inc.,* 159 Wash.2d 903, 915–16, 154 P.3d 882 (2007) (citing *Queen City Sav. & Loan Ass'n v. Mannhalt,* 111 Wash.2d 503, 514, 760 P.2d 350 (1988) (Dore, J., dissenting)). Critically under our statutory system, a trustee is not merely an agent for the lender or the lender's successors. Trustees have obligations to all of the parties to the deed, including the homeowner. RCW 61.24.010(4) ("The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor."); *Cox v. Helenius,* 103 Wash.2d 383, 389, 693 P.2d 683 (1985) (citing George E. Osborne, Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 7.21 (1979) ("[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.")).[4] Among other things, "the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust" and shall provide the homeowner with "the name and address of the owner of any promissory notes or other obligations secured by the deed of trust" before foreclosing on an owner-occupied home. RCW 61.24.030(7)(a), (8)(*l*).

*4 [6] ¶ 12 Finally, throughout this process, courts must be mindful of the fact that "Washington's deed of trust act should be construed to further three basic objectives." *Cox,* 103 Wash.2d at 387, 693 P.2d 683 (citing Joseph L. Hoffmann, Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington,* 59 Wash. L.Rev. 323, 330 (1984)). "First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles." *Id.* (citation omitted) (citing *Peoples Nat'l Bank of Wash. v. Ostrander,* 6 Wash.App. 28, 491 P.2d 1058 (1971)).

MERS

¶ 13 MERS, now a Delaware corporation, was established in the mid 1990s by a consortium of public and private entities that included the **Mortgage** Bankers Association of America, the Federal National **Mortgage** Association (Fannie Mae), the Federal Home Loan **Mortgage** Corporation (Freddie Mac), the Government National **Mortgage** Association (Ginnie Mae), the American Bankers Association, and the American Land Title Association, among many others. *See In re MERSCORP, Inc. v. Romaine,* 8 N.Y.3d 90, 96 n. 2, 861 N.E.2d 81, 828 N.Y.S.2d 266 (2006); Phyllis K. Slesinger & Daniel McLaughlin, ***Mortgage Electronic*** *Registration System,* 31 Idaho L.Rev. 805, 807 (1995); Christopher L. Peterson, *Foreclosure, Subprime* ***Mortgage*** *Lending, and the* ***Mortgage Electronic*** *Registration System,* 78 U. Cin. L.Rev. 1359, 1361 (2010). It established "a central, **electronic** registry for tracking **mortgage** rights ... [where p]arties will be able to access the central registry (on a need to know basis)." Slesinger & McLaughlin, *supra,* at 806. This was intended to reduce the costs, increase the efficiency, and facilitate the securitization of **mortgages** and thus increase liquidity. Peterson, *supra,* at 1361.[5] As the New York high court described the process:

> The initial MERS **mortgage** is recorded in the County Clerk's office with "**Mortgage Electronic** Registration Systems, Inc." named as the lender's nominee or mortgagee of record on the instrument. During the lifetime of the **mortgage**, the beneficial ownership interest or servicing rights may be transferred among MERS members (MERS assignments), but these assignments are not publicly recorded; instead they are tracked **electronically** in MERS's private system.

Romaine, 8 N.Y.3d at 96, 828 N.Y.S.2d 266, 861 N.E.2d 81. MERS "tracks transfers of servicing rights and beneficial ownership interests in **mortgage** loans by using a permanent 18–digit number called the **Mortgage** Identification Number." Resp. Br. of MERS at 13 (Bain) (footnote omitted). It facilitates secondary markets in **mortgage** debt and servicing rights, without the traditional costs of recording transactions with the local county records offices. Slesinger & McLaughlin, *supra,* at 808; *In re Agard,* 444 B.R. 231, 247 (Bankr.E.D.N.Y.2011).

*5 ¶ 14 Many loans have been pooled into securitization trusts where they, hopefully, produce income for investors. *See, e.g., Pub. Emps' Ret. Sys. of Miss. v. Merrill Lynch & Co.,* 277 F.R.D. 97, 102–03 (S.D.N.Y.2011) (discussing process

of pooling **mortgages** into asset backed securities). MERS has helped overcome what had come to be seen as a drawback of the traditional **mortgage** financing model: lack of liquidity. MERS has facilitated securitization of **mortgages** bringing more money into the home **mortgage** market. With the assistance of MERS, large numbers of **mortgages** may be pooled together as a single asset to serve as security for creative financial instruments tailored to different investors. Some investors may buy the right to interest payments only, others principal only; different investors may want to buy interest in the pool for different durations. *Mortg. Elec. Registration Sys., Inc. v. Azize,* 965 So.2d 151, 154 n. 3 (Fla.Dist.Ct.App.2007); Dustin A. Zacks, *Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures,* 29 Quinnipiac L.Rev. 551, 570–71 (2011); Chana Joffe–Walt & David Kestenbaum, *Before Toxie Was Toxic,* Nat'l Pub. Radio (Sept. 17, 2010, 12:00 A.M.)[6] (discussing formation of **mortgage** backed securities). In response to the changes in the industries, some states have explicitly authorized lenders' nominees to act on lenders' behalf. *See, e.g., Jackson v. Mortg. Elec. Registration Sys., Inc.,* 770 N.W.2d 487, 491 (Minn.2009) (noting Minn.Stat. § 507.413 is "frequently called 'the MERS statute' "). As of now, our state has not.

¶ 15 As MERS itself acknowledges, its system changes "a traditional three party deed of trust [into] a four party deed of trust, wherein MERS would act as the contractually agreed upon beneficiary for the lender and its successors and assigns." MERS Resp. Br. at 20 (Bain). As recently as 2004, learned commentators William Stoebuck and John Weaver could confidently write that "[a] general axiom of **mortgage** law is that obligation and **mortgage** cannot be split, meaning that the person who can foreclose the **mortgage** must be the one to whom the obligation is due." 18 Stoebuck & Weaver, *supra,* § 18.18, at 334. MERS challenges that general axiom. Since then, as the New York bankruptcy court observed recently:

> In the most common residential lending scenario, there are two parties to a real property **mortgage**—a mortgagee, *i.e.,* a lender, and a mortgagor, *i.e.,* a borrower. With some nuances and allowances for the needs of modern finance this model has been followed for hundreds of years. The MERS business plan, as envisioned and implemented by lenders and others involved in what has become known as the **mortgage** finance industry, is based in large part on amending this traditional model and introducing a third party into the equation. MERS is, in fact, neither a borrower nor a lender, but rather purports to be both "mortgagee of record" and a "nominee" for the mortgagee. MERS was created to alleviate problems created by, what was determined by the financial community to be, slow and burdensome recording processes adopted by virtually every state and locality. In effect the MERS system was designed to circumvent these procedures. MERS, as envisioned by its originators, operates as a replacement for our traditional system of public recordation of **mortgages**.
>
> **6** *Agard,* 444 B.R. at 247.

¶ 16 Critics of the MERS system point out that after bundling many loans together, it is difficult, if not impossible, to identify the current holder of any particular loan, or to negotiate with that holder. While not before us, we note that this is the nub of this and similar litigation and has caused great concern about possible errors in foreclosures, misrepresentation, and fraud. Under the MERS system, questions of authority and accountability arise, and determining who has authority to negotiate loan modifications and who is accountable for misrepresentation and fraud becomes extraordinarily difficult.[7] The MERS system may be inconsistent with our second objective when interpreting the deed of trust act: that "the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure." *Cox,* 103 Wash.2d at 387, 693 P.2d 683 (citing *Ostrander,* 6 Wash.App. 28, 491 P.2d 1058).

¶ 17 The question, to some extent, is whether MERS and its associated business partners and institutions can both replace the existing recording system established by Washington statutes and still take advantage of legal procedures established in those same statutes. With this background in mind, we turn to the certified questions.

I. Deed of Trust Beneficiaries

¶ 18 Again, the federal court has asked:

1. Is **Mortgage Electronic** Registration Systems, Inc., a lawful "beneficiary" within the terms of Washington's Deed of Trust Act, Revised Code of Washington section 61.24.005(2), if it never held the promissory note secured by the deed of trust?

Certification at 3.

A. Plain Language

[7] ¶ 19 Under the plain language of the deed of trust act, this appears to be a simple question. Since 1998, the deed of trust act has defined a "beneficiary" as "the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation." Laws of 1998, ch. 295, § 1(2), codified as RCW 61.24.005(2).[8] Thus, in the terms of the certified question, if MERS never "held the promissory note" then it is not a "lawful 'beneficiary.' "

¶ 20 MERS argues that under a more expansive view of the act, it meets the statutory definition of "beneficiary." It notes that the definition section of the deed of trust act begins by cautioning that its definitions apply " '*unless the context clearly requires otherwise.*' " Resp. Br. of MERS at 19 (Bain) (quoting RCW 61.24.005). MERS argues that "*[t]he context* here *requires* that MERS be recognized as a proper 'beneficiary' under the Deed of Trust [Act]. The context here is that the Legislature was creating a more efficient default remedy for lenders, not putting up barriers to foreclosure." *Id.* It contends that the parties were legally entitled to contract as they see fit, and that the "the parties contractually agreed that the 'beneficiary' under the Deed of Trust was 'MERS' and it is in that context that the Court should apply the statute." *Id.* at 20 (emphasis omitted).

*7 ¶ 21 The "unless the context clearly requires otherwise" language MERS relies upon is a common phrase that the legislative bill drafting guide recommends be used in the introductory language in all statutory definition sections. *See* Statute Law Comm., Office of the Code Reviser, Bill Drafting Guide 2011.[9] A search of the unannotated Revised Code of Washington indicates that this statutory language has been used over 600 times. Despite its ubiquity, we have found no case—and MERS draws our attention to none—where this common statutory phrase has been read to mean that the *parties* can alter statutory provisions by contract, as opposed to the act itself suggesting a different definition might be appropriate for a specific statutory provision. We have interpreted the boilerplate: "The definitions in this section apply throughout the chapter unless the context clearly requires otherwise" language only once, and then in the context of determining whether a general court-martial qualified as a prior conviction for purposes of the Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW. *See State v. Morley,* 134 Wash.2d 588, 952 P.2d 167 (1998). There, the two defendants challenged the use of their prior general courts-martial on the ground that the SRA defined "conviction" as " 'an adjudication of guilt pursuant to Titles 10 or 13 RCW.' " *Morley,* 134 Wash.2d at 595, 952 P.2d 167 (quoting RCW 9.94A.030(9)). Since, the defendants reasoned, their courts-martial were not "pursuant to Titles 10 or 13 RCW," they should not be considered criminal history. We noted that the SRA frequently treated out-of-state convictions (which would also not be pursuant to Titles 10 or 13 RCW) as convictions and rejected the argument since the specific statutory context required a broader definition of the word "convictions" than the definition section provided. *Id.* at 598, 952 P.2d 167. MERS has cited no case, and we have found none that holds that *extrastatutory* conditions can create a context where a different definition of defined terms would be appropriate. We do not find this argument persuasive.

¶ 22 MERS also argues that it meets the statutory definition itself. It notes, correctly, that the legislature did not limit "beneficiary" to the holder of the promissory note: instead, it is "the holder of the *instrument or document* evidencing the obligations secured by the deed of trust." RCW 61.24.005(2) (emphasis added). It suggests that "instrument" and "document" are broad terms and that "in the context of a residential loan, undoubtedly the Legislature was referring to all of the loan documents that make up the loan transaction *i.e.,* the note, the deed of trust, and any other rider or document that sets forth the rights and obligations of the parties under the loan," and that "obligation" must be read to include any financial obligation under any document signed in relation to the loan, including "attorneys' fees and costs incurred in the event of default." Resp. Br. of MERS at 21–22 (Bain). In these particular cases, MERS contends that it is a proper beneficiary because, in its view, it is "indisputably the 'holder' of the Deed of Trust." *Id.* at 22. It provides no authority for its characterization of itself as "indisputably the 'holder' " of the deeds of trust.

*8 ¶ 23 The homeowners, joined by the Washington attorney general, do dispute MERS' characterization of itself as the holder of the deeds of trust. Starting from the language of RCW 61.24.005(2) itself, the attorney general contends that "[t]he 'instrument' obviously means the promissory note because the only other document in the transaction is the deed of trust and it would be absurd to read this definition as saying that " 'beneficiary means the holder of the deed of trust secured by the deed of trust." ' " Br. of Amicus Att'y General (AG Br.) at 2–3 (quoting RCW 61.24.005(2)). We agree that an interpretation "beneficiary" that has the deed of trust securing itself is untenable.

¶ 24 Other portions of the deed of trust act bolster the conclusion that the legislature meant to define "beneficiary" to mean the actual holder of the promissory note or other debt instrument. In the same 1998 bill that defined "beneficiary" for the first time, the legislature amended RCW 61.24.070 (which had previously forbidden the trustee alone from bidding at a trustee sale) to provide:

> (1) The trustee may not bid at the trustee's sale. Any other person, including the beneficiary, may bid at the trustee's sale.
>
> (2) The trustee shall, at the request of the beneficiary, credit toward the beneficiary's bid all or any part of the monetary obligations secured by the deed of trust. If the beneficiary is the purchaser, any amount bid by the beneficiary in excess of the amount so credited shall be paid to the trustee in the form of cash, certified check, cashier's check, money order, or funds received by verified **electronic** transfer, or any combination thereof. If the purchaser is not the beneficiary, the entire bid shall be paid to the trustee in the form of cash, certified check, cashier's check, money order, or funds received by verified **electronic** transfer, or any combination thereof.

Laws of 1998, ch. 295, § 9, codified as RCW 61.24.070. As Bain notes, this provision makes little sense if the beneficiary does not hold the note. Bain Reply to Resp. to Opening Br. at 11. In essence, it would authorize the non-holding beneficiary to credit to its bid funds to which it had no right. However, if the beneficiary is defined as the entity that holds the note, this provision straightforwardly allows the noteholder to credit some or all of the debt to the bid. Similarly, in the commercial loan context, the legislature has provided that "[a] beneficiary's acceptance of a deed in lieu of a trustee's sale under a deed of trust securing a commercial loan exonerates the guarantor from any liability for the debt secured thereby except to the extent the guarantor otherwise agrees as part of the deed in lieu transaction." RCW 61.24.100(7). This provision would also make little sense if the beneficiary did not hold the promissory note that represents the debt.

¶ 25 Finding that the beneficiary must hold the promissory note (or other "instrument or document evidencing the obligation secured") is also consistent with recent legislative findings to the Foreclosure Fairness Act of 2011, Laws of 2011, ch. 58, § 3(2). The legislature found:

> *9 [(1)] (a) The rate of home foreclosures continues to rise to unprecedented levels, both for prime and subprime loans, and a new wave of foreclosures has occurred due to rising unemployment, job loss, and higher adjustable loan payments;
>
> ....
>
> (2) Therefore, the legislature intends to:
>
> ....
>
> (b) Create a framework *for homeowners and beneficiaries to communicate with each other* to reach a resolution and avoid foreclosure whenever possible; and
>
> (b) Provide a process for foreclosure mediation.

Laws of 2011, ch. 58, § 1 (emphasis added). There is no evidence in the record or argument that suggests MERS has the power "to reach a resolution and avoid foreclosure" on behalf of the noteholder, and there is considerable reason to believe it does not. Counsel informed the court at oral argument that MERS does not negotiate on behalf of the holders of the note.[10] If the legislature intended to authorize nonnoteholders to act as beneficiaries, this provision makes little sense. However, if the legislature understood "beneficiary" to mean "noteholder," then this provision makes considerable sense. The legislature was attempting to create a framework where the stakeholders could negotiate a deal in the face of changing conditions.

[8] ¶ 26 We will also look to related statutes to determine the meaning of statutory terms. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wash.2d 1, 11–12, 43 P.3d 4 (2002). Both the plaintiffs and the attorney general draw our attention to the definition of "holder" in the Uniform Commercial Code (UCC), which was adopted in the same year as the deed of trust act. *See* Laws of 1965, Ex.Sess., ch. 157(UCC); Laws

of 1965, ch. 74 (deed of trust act); Selkowitz Opening Br. at 13; AG Br. at 11–12. Stoebuck and Weaver note that the transfer of **mortgage** backed obligations is governed by the UCC, which certainly suggests the UCC provisions may be instructive for other purposes. 18 Stoebuck & Weaver, *supra,* § 18.18, at 334. The UCC provides:

> "Holder" with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. "Holder" with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

Former RCW 62A.1–201(20) (2001).[11] The UCC also provides:

> "Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3–309 or 62A.3–418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

***10** RCW 62A.3–301. The plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions, and thus a beneficiary must either actually possess the promissory note or be the payee. E.g., Selkowitz Opening Br. at 14. We agree. This accords with the way the term "holder" is used across the deed of trust act and the Washington UCC. By contrast, MERS's approach would require us to give "holder" a different meaning in different related statutes and construe the deed of trust act to mean that a deed of trust may secure itself or that the note follows the security instrument. Washington's deed of trust act contemplates that the security instrument will follow the note, not the other way around. MERS is not a "holder" under the plain language of the statute.

B. Contract and Agency

¶ 27 In the alternative, MERS argues that the borrowers should be held to their contracts, and since they agreed in the deeds of trust that MERS would be the beneficiary, it should be deemed to be the beneficiary. E.g., Resp. Br. of MERS at 24 (Bain). Essentially, it argues that we should insert the parties' agreement into the statutory definition. It notes that another provision of Title 61 RCW specifically allows parties to insert side agreements or conditions into **mortgages**. RCW 61.12.020 ("Every such **mortgage**, when otherwise properly executed, shall be deemed and held a good and sufficient conveyance and **mortgage** to secure the payment of the money therein specified. The parties may insert in such **mortgage** any lawful agreement or condition.").

¶ 28 MERS argues we should be guided by *Cervantes v. Countrywide Home Loans, Inc.,* 656 F.3d 1034 (9th Cir.2011). In *Cervantes,* the Ninth Circuit Court of Appeals affirmed dismissal of claims for fraud, intentional infliction of emotional distress, and violations of the federal Truth in Lending Act and the Arizona Consumer Fraud Act against MERS, Countrywide Home Loans, and other financial institutions. *Id.* at 1041. We do not find *Cervantes* instructive. *Cervantes* was a putative class action that was dismissed on the pleadings for a variety of reasons, the vast majority of which are irrelevant to the issues before us. *Id.* at 1038. After dismissing the fraud claim for failure to allege facts that met all nine elements of a fraud claim in Arizona, the Ninth Circuit observed that MERS's role was plainly laid out in the deeds of trust. *Id.* at 1042. Nowhere in *Cervantes* does the Ninth Circuit suggest that the parties could contract around the statutory terms.

¶ 29 MERS also seeks support in a Virginia quiet title action. *Horvath v. Bank of N.Y., N.A.,* 641 F.3d 617, 620 (4th Cir.2011). After Horvath had become delinquent in his **mortgage** payments and after a foreclosure sale, Horvath sued the holder of the note and MERS, among others, on a variety of claims, including a claim to quiet title in his favor on the ground that various financial entities had by " 'splitting ... the pieces of 'his **mortgage** ... 'caused the Deeds of Trust [to] split from the Notes and [become] unenforceable.' " *Id.* at 620 (alterations in original) (quoting complaint). The Fourth Circuit rejected Horvath's quiet title claim out of hand, remarking:

> ***11** It is difficult to see how Horvath's arguments could possibly be correct. Horvath's note plainly

> constitutes a negotiable instrument under Va.Code Ann. § 8.3A–104. That note was endorsed in blank, meaning it was bearer paper and enforceable by whoever possessed it. *See* Va.Code Ann. § 8.3A–205(b). And BNY [(Bank of New York)] possessed the note at the time it attempted to foreclose on the property. Therefore, once Horvath defaulted on the property, Virginia law straightforwardly allowed BNY to take the actions that it did.

Id. at 622. There is no discussion anywhere in Horvath of any statutory definition of "beneficiary." While the opinion discussed transferability of notes under the UCC as adopted in Virginia, there is only the briefest mention of the Virginia deed of trust act. *Compare Horvath,* 641 F.3d at 621–22 (citing various provisions of Va.Code Ann. Titles 8.1A, 8.3A (UCC)), *with id.* at 623 n. 3 (citing Va.Code. Ann. § 55–59(7) (discussing deed of trust foreclosure proceedings)). We do not find *Horvath* helpful.

¶ 30 Similarly, MERS argues that lenders and their assigns are entitled to name it as their agent. E.g., Resp. Br. of MERS at 29–30 (Bain). That is likely true and nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents. *See, e.g.,* former RCW 61.24.031(1)(a) (2011) ("A trustee, beneficiary, *or authorized agent* may not issue a notice of default ... until ...." (emphasis added)). MERS notes, correctly, that we have held "an agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control." *Moss v. Vadman,* 77 Wash.2d 396, 402–03, 463 P.2d 159 (1970) (citing *Matsumura v. Eilert,* 74 Wash.2d 362, 444 P.2d 806 (1968)).

[9] [10] ¶ 31 But *Moss* also observed that "[w]e have repeatedly held that a prerequisite of an agency is *control* of the agent by the principal." *Id.* at 402, 463 P.2d 159 (emphasis added) (citing *McCarty v. King County Med. Serv. Corp.,* 26 Wash.2d 660, 175 P.2d 653 (1946)). While we have no reason to doubt that the lenders and their assigns control MERS, agency requires a specific principal that is accountable for the acts of its agent. If MERS is an agent, its principals in the two cases before us remain unidentified. [12] MERS attempts to sidestep this portion of traditional agency law by pointing to the language in the deeds of trust that describe MERS as "acting solely as a nominee for Lender and Lender's successors and assigns." Doc. 131–2, at 2 (Bain deed of trust); Doc. 9–1, at 3 (Selkowitz deed of trust.); e.g., Resp. Br. of MERS at 30 (Bain). But MERS offers no authority for the implicit proposition that the lender's nomination of MERS as a nominee rises to an agency relationship with successor noteholders. [13] MERS fails to identify the entities that control and are accountable for its actions. It has not established that it is an agent for a lawful principal.

*12 ¶ 32 This is not the first time that a party has argued that we should give effect to its contractual modification of a statute. *See Godfrey v. Hartford Ins. Cas. Co.,* 142 Wash.2d 885, 16 P.3d 617 (2001); *see also Nat'l Union Ins. Co. of Pittsburgh, Pa. v. Puget Sound Power & Light,* 94 Wash.App. 163, 177, 972 P.2d 481 (1999) (holding a business and a utility could not contract around statutory uniformity requirements); *State ex rel. Standard Optical Co. v. Superior Court,* 17 Wash.2d 323, 329, 135 P.2d 839 (1943) (holding that a corporation could not avoid statutory limitations on scope of practice by contract with those who could so practice); *cf. Vizcaino v. Microsoft Corp.,* 120 F.3d 1006, 1011–12 (9th Cir.1997) (noting that Microsoft's agreement with certain workers that they were not employees was not binding). *In Godfrey,* Hartford Casualty Insurance Company had attempted to pick and chose what portions of Washington's uniform arbitration act, chapter 7.04A RCW, it and its insured would use to settle disputes. *Godfrey,* 142 Wash.2d at 889, 16 P.3d 617. The court noted that parties were free to decide whether to arbitrate, and what issues to submit to arbitration, but "once an issue is submitted to arbitration ... Washington's [arbitration] Act applies." *Id.* at 894, 16 P.3d 617. By submitting to arbitration, "they have activated the entire chapter and the policy embodied therein, not just the parts that are useful to them." *Id.* at 897, 16 P.3d 617. The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly. MERS did not become a beneficiary by contract or under agency principals.

C. Policy

[11] ¶ 33 MERS argues, strenuously, that as a matter of public policy it should be allowed to act as the beneficiary of a deed of trust because "the Legislature certainly did not intend for home loans in the State of Washington to become

unsecured, or to allow defaulting home loan borrowers to avoid non-judicial foreclosure, through manipulation of the defined terms in the [deed of trust] Act ." Resp. Br. of MERS at 23 (Bain). One difficulty is that it is not the plaintiffs that manipulated the terms of the act: it was whoever drafted the forms used in these cases. There are certainly significant benefits to the MERS approach but there may also be significant drawbacks. The legislature, not this court, is in the best position to assess policy considerations. Further, although not considered in this opinion, nothing herein should be interpreted as preventing the parties to proceed with judicial foreclosures. That must await a proper case.

D. Other Courts

¶ 34 Unfortunately, we could find no case, and none have been drawn to our attention, that meaningfully discusses a statutory definition like that found in RCW 61.24.005(2). MERS asserts that "the United States District Court for the Western District of Washington has recently issued a series of opinions on the very issues before the Court, finding in favor of MERS." Resp. Br. of MERS at 35–36 (Bain) (citing *Daddabbo v. Countrywide Home Loans, Inc.*, No. C09–1417RAJ, 2010 WL 2102485 (W.D.Wash. May 20, 2010) (unpublished); *St. John v. Nw Tr. Ser., Inc.*, No. C11–5382BHS, 2011 WL 4543658 (W.D. Wash. Sept. 29, 2011, Dismissal Order) (unpublished); *Vawter v. Quality Loan Service Corp. of Wash.*, 707 F.Supp.2d 1115 (W.D.Wash.2010)). These citations are not well taken. *Daddabbo* never mentions RCW 61.24.005(2). *St. John* mentions it in passing but devotes no discussion to it. 2011 WL 4543658, at *3. *Vawter* mentions RCW 61.24.005(2) once, in a block quote from an unpublished case, without analysis. We do not find these cases helpful. [14]

***13** ¶ 35 Amicus WBA draws our attention to three cases where state supreme courts have held MERS could exercise the rights of a beneficiary. Amicus Br. of WBA at 12 (Bain) (citing *Trotter v. Bank of N.Y. Mellon*, No. 38022, 2012 WL 206004 (Idaho Jan. 25, 2012) (unpublished), *withdrawn and superseded by* 152 Idaho 842, 275 P.3d 857 (2012); *Residential Funding Co. v. Saurman*, 490 Mich. 909, 805 N.W.2d 183 (2011); *RMS Residential Props., LLC v. Miller*, 303 Conn. 224, 226, 32 A.3d 307 (2011)). *But see Agard*, 444 B.R. at 247 (collecting contrary cases); *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623–24 (Mo.App.2009) (holding MERS lacked authority to make a valid assignment of the note). But none of these cases, on either side, discuss a statutory definition of "beneficiary" that is similar to ours, and many are decided on agency grounds that are not before us. We do not find them helpful either.

¶ 36 We answer the first certified question "No," based on the plain language of the statute. MERS is an ineligible " 'beneficiary' within the terms of the Washington Deed of Trust Act," if it never held the promissory note or other debt instrument secured by the deed of trust.

II. Effect

¶ 37 The federal court has also asked us:

> 2. If so, what is the legal effect of **Mortgage Electronic** Registration Systems, Inc., acting as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?

¶ 38 We conclude that we cannot decide this question based upon the record and briefing before us. To assist the certifying court, we will discuss our reasons for reaching this conclusion.

¶ 39 MERS contends that if it is acting as an unlawful beneficiary, its status should have no effect: "All that it would mean is that there was a technical violation of the Deed of Trust Act that all parties were aware of when the loan was originally entered into." Resp. Br. of MERS at 41 (Bain). "At most ... MERS would simply need to assign its legal interest in the Deed of Trust to the lender before the lender proceeded with foreclosure." *Id.* at 41–42. The difficulty with MERS's argument is that if in fact MERS is not the beneficiary, then the equities of the situation would likely (though not necessarily in every case) require the court to deem that the real beneficiary is the lender whose interests were secured by the deed of trust or that lender's successors. [15] If the original lender had sold the loan, that purchaser would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions. Having MERS convey its "interests" would not accomplish this.

¶ 40 In the alternative, MERS suggests that, if we find a violation of the act, "MERS should be required to assign its interest in any deed of trust to the holder of the promissory note, and have that assignment recorded in the land title records, before any non-judicial foreclosure could take place." Resp. Br. of MERS at 44 (Bain). But if MERS is not the beneficiary as contemplated by Washington law, it

is unclear what rights, if any, it has to convey. Other courts have rejected similar suggestions. *Bellistri,* 284 S.W.3d at 624 (citing *George v. Surkamp,* 336 Mo. 1, 9, 76 S.W.2d 368 (1934)). Again, the identity of the beneficiary would need to be determined. Because it is the repository of the information relating to the chain of transactions, MERS would be in the best position to prove the identity of the holder of the note and beneficiary.

*14 ¶ 41 Partially relying on the *Restatement (Third) of Property: **Mortgages*** § 5.4 (1997), Selkowitz suggests that the proper remedy for a violation of chapter 61.24 RCW "should be rescission, which does not excuse Mr. Selkowitz from payment of any monetary obligation, but merely precludes non-judicial foreclosure of the subject Deed of Trust. Moreover, if the subject Deed of Trust is void, Mr. Selkowitz should be entitled to quiet title to his property." Pl.'s Opening Br. at 40 (Selkowitz). It is unclear what he believes should be rescinded. He offers no authority in his opening brief for the suggestion that listing an ineligible beneficiary on a deed of trust would render the deed void and entitle the borrower to quiet title. He refers to cases where the lack of a grantee has been held to void a deed, but we do not find those cases helpful. In one of those cases, the New York court noted, "No mortgagee or obligee was named in [the security agreement], and no right to maintain an action thereon, or to enforce the same, was given therein to the plaintiff or any other person. It was, *per se,* of no more legal force than a simple piece of blank paper." *Chauncey v. Arnold,* 24 N.Y. 330, 335 (1862). But the deeds of trust before us names all necessary parties and more.

¶ 42 Selkowitz argues that MERS and its allied companies have split the deed of trust from the obligation, making the deed of trust unenforceable. While that certainly *could* happen, given the record before us, we have no evidence that it did. If, for example, MERS is in fact an agent for the holder of the note, likely no split would have happened.

¶ 43 In the alternative, Selkowitz suggests the court create an equitable **mortgage** in favor of the noteholder. Pl.'s Opening Br. at 42 (Selkowitz). If in fact, such a split occurred, the *Restatement* suggests that would be an appropriate resolution. Restatement (Third) of Property: **Mortgages** § 5.4 reporters' note, at 386 (1997) (citing *Lawrence v. Knap,* 1 Root (Conn.) 248 (1791)). But since we do not know whether or not there has been a split of the obligation from the security instrument, we have no occasion to consider this remedy.

¶ 44 Bain specifically suggests we follow the lead of the Kansas Supreme Court in *Landmark National Bank v. Kesler,* 289 Kan. 528, 216 P.3d 158 (2009). In *Landmark,* the homeowner, Kesler, had used the same piece of property to secure two loans, both recorded with the county. *Id.* Kesler went bankrupt and agreed to surrender the property. *Id.* One of the two lenders filed a petition to foreclose and served both Kesler and the other recorded lender, but not MERS. *Id.* at 531, 216 P.3d 158. The court concluded that MERS had no interest in the property and thus was not entitled to notice of the foreclosure sale or entitled to intervene in the challenge to it. *Id.* at 544–45, 216 P.3d 158; *accord Mortg. Elec. Registration Sys., Inc. v. Sw. Homes of Ark., Inc.,* 2009 Ark. 152, 301 S.W.3d 1 (2009). Bain suggests we follow *Landmark,* but *Landmark* has nothing to say about the effect of listing MERS as a beneficiary. We agree with MERS that it has no bearing on the case before us. Resp. Br. of MERS at 39 (Bain).

*15 ¶ 45 Bain also notes, albeit in the context of whether MERS could be a beneficiary without holding the promissory note, that our Court of Appeals held that " '[i]f the obligation for which the **mortgage** was given fails for some reason, the **mortgage** is unenforceable.' " Pl. Bain's Opening Br. (Bain Op. Br.) at 34 (quoting *Fid. & Deposit Co. of Md. v. Ticor Title Ins. Co.,* 88 Wash.App. 64, 68, 943 P.2d 710 (1997)). She may be suggesting that the listing of an erroneous beneficiary on the deed of trust should sever the security interest from the debt. If so, the citation to *Fidelity* is not helpful. In *Fidelity,* the court was faced with what appeared to be a scam. William and Mary Etter had executed a promissory note, secured by a deed of trust, to Citizen's National **Mortgage,** which sold the note to Affiliated **Mortgage** Company. Citizen's also forged the Etters' name on *another* promissory note and sold it to another buyer, along with what appeared to be an assignment of the deed of trust, who ultimately assigned it to Fidelity. The buyer of the forged note recorded its interests first, and Fidelity claimed it had priority to the Etters' **mortgage** payments. The Court of Appeals properly disagreed. *Fidelity,* 88 Wash.App. at 66–67, 943 P.2d 710. It held that forgery mattered and that Fidelity had no claim on the Etters' **mortgage** payments. *Id.* at 67–68, 943 P.2d 710. It did not hold that the forgery relieved the Etters of paying the **mortgage** to the actual holder of the promissory note.

¶ 46 MERS states that any violation of the deed of trust act "should not result in a void deed of trust, both legally and from a public policy standpoint." Resp. Br. of MERS at 44. While

we tend to agree, resolution of the question before us depends on what actually occurred with the loans before us and that evidence is not in the record. We note that Bain specifically acknowledges in her response brief that she "understands that she is going to have to make up the **mortgage** payments that have been missed," which suggests she is not seeking to clear title without first paying off the secured obligation. Pl. Bain's Reply Br. at 1. In oral argument, Bain suggested that if the holder of the note were to properly transfer the note to MERS, MERS could proceed with foreclosure. [16] This may be true. We can answer questions of law but not determine facts. We, reluctantly decline to answer the second certified question on the record before us.

III. CPA Action

¶ 47 Finally, the federal court asked:

> 3. Does a homeowner possess a cause of action under Washington's Consumer Protection Act against **Mortgage Electronic** Registration Systems, Inc., if MERS acts as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?

Certification at 4. Bain contends that MERS violated the CPA when it acted as a beneficiary. Bain Op. Br. at 43. [17]

[12] ¶ 48 To prevail on a CPA action, the plaintiff must show "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986). MERS does not dispute all the elements. Resp. Br. of MERS at 45; Resp. Br. of MERS (Selkowitz) at 37. We will consider only the ones that it does.

A. Unfair or Deceptive Act or Practice

*16 [13] [14] [15] [16] [17] [18] ¶ 49 As recently summarized by the Court of Appeals:

> To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has "the *capacity* to deceive a substantial portion of the public." *Hangman Ridge,* 105 Wash.2d at 785 [719 P.2d 531]. Even accurate information may be deceptive " 'if there is a representation, omission or practice that is likely to mislead.' " *Panag v. Farmers Ins. Co. of Wash.*, 166 Wash.2d 27, 50, 204 P.3d 885 (2009) (quoting *Sw. Sunsites, Inc. v. Fed. Trade Comm'n,* 785 F.2d 1431, 1435 (9th Cir.1986)). Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA. *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.,* 87 Wash.2d, 298, 305–09, 553 P.2d 423 (1976). Whether particular actions are deceptive is a question of law that we review de novo. *Leingang v. Pierce County Med. Bureau,* 131 Wash.2d 133, 150, 930 P.2d 288 (1997).

State v. Kaiser, 161 Wash.App. 705, 719, 254 P.3d 850 (2011). MERS contends that the only way that a plaintiff can meet this first element is by showing that its conduct was deceptive and that the plaintiffs cannot show this because "MERS fully described its role to Plaintiff through the very contract document that Plaintiff signed." Resp. Br. of MERS at 46 (Selkowitz). Unfortunately, MERS does not elaborate on that statement, and nothing on the deed of trust itself would alert a careful reader to the fact that MERS would *not* be holding the promissory note.

¶ 50 The attorney general of this state maintains a consumer protection division and has considerable experience and expertise in consumer protection matters. As amicus, the attorney general contends that MERS is claiming to be the beneficiary "when it knows or should know that under Washington law it must hold the note to be the beneficiary" and seems to suggest we hold that claim is per se deceptive and/or unfair. AG Br. at 14. This contention finds support in *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wash.2d 59, 170 P.3d 10 (2007), where we found a telephone company had committed a deceptive act as a matter of law by listing a surcharge "on a portion of the invoice that included state and federal tax charges." *Id.* at 76, 170 P.3d 10. We found that placement had " 'the capacity to deceive a substantial portion of the public' " into believing the fee was a tax. *Id.* (emphasis omitted) (quoting *Hangman Ridge,* 105 Wash.2d at 785, 719 P.2d 531). Our attorney general also notes that the assignment of the deed of trust that MERS uses purports to transfer its beneficial interest on behalf of its own successors and assigns, not on behalf of any principal. The assignment used in Bain's case, for example, states:

> FOR VALUE RECEIVED, the undersigned, **Mortgage Electronic** Registration Systems, Inc. AS NOMINEE FOR ITS SUCCESSORS

> AND ASSIGNS, by these presents, grants, bargains, sells, assigns, transfers, and sets over unto INDYMAC FEDERAL BANK, FSB all beneficial interest under that certain Deed of Trust dated 3/9/2007.

*17 Doc. 1, Ex. A to Huelsman Decl. This undermines MERS's contention that it acts only as an agent for a lender/principal and its successors and it "conceals the identity of whichever loan holder MERS purports to be acting for when assigning the deed of trust." AG Br. at 14. The attorney general identifies other places where MERS purports to be acting as the agent for its own successors, not for some principal. *Id.* at 15 (citing Doc. 1, Ex. B). Many other courts have found it deceptive to claim authority when no authority existed and to conceal the true party in a transaction. *Stephens v. Omni Ins. Co.*, 138 Wash.App. 151, 159 P.3d 10 (2007); *Floersheim v. Fed. Trade Comm'n*, 411 F.2d 874, 876–77 (9th Cir.1969). In *Stephens*, an insurance company that had paid under an uninsured motorist policy hired a collections agency to seek reimbursement from the other parties in a covered accident. *Stephens*, 138 Wash.App. at 161, 159 P.3d 10. The collection agency sent out aggressive notices that listed an "amount due" and appeared to be collection notices for debt due, though a careful scrutiny would have revealed that they were effectively making subrogation claims. *Id.* at 166–68, 159 P.3d 10. The court found that "characterizing an unliquidated [tort] claim as an 'amount due' has the capacity to deceive." *Id.* at 168, 159 P.3d 10.

¶ 51 While we are unwilling to say it is per se deceptive, we agree that characterizing MERS as the beneficiary has the capacity to deceive and thus, for the purposes of answering the certified question, presumptively the first element is met.

B. Public Interest Impact

[19] ¶ 52 MERS contends that plaintiffs cannot show a public interest impact because, it contends, each plaintiff is challenging "MERS's role as the beneficiary under Plaintiff's Deed of Trust in the context of the foreclosure proceedings on Plaintiff's property." Resp. Br. of MERS at 40 (Selkowitz) (emphasis omitted). But there is considerable evidence that MERS is involved with an enormous number of **mortgages** in the country (and our state), perhaps as many as half nationwide. John R. Hooge & Laurie Williams, ***Mortgage Electronic*** *Registration Systems, Inc.: A Survey of Cases Discussing MERS' Authority to Act*, Norton Bankr.L. Advisory No. 8, at 21 (Aug.2010). If in fact the language is unfair or deceptive, it would have a broad impact. This element is also presumptively met.

C. Injury

¶ 53 MERS contends that the plaintiffs can show no injury caused by its acts because whether or not the noteholder is known to the borrower, the loan servicer is and, it suggests, that is all the homeowner needs to know. Resp. Br. of MERS at 48–49 (Bain); Resp. Br. of MERS at 41 (Selkowitz). But there are many different scenarios, such as when homeowners need to deal with the holder of the note to resolve disputes or to take advantage of legal protections, where the homeowner does need to know more and can be injured by ignorance. Further, if there have been misrepresentations, fraud, or irregularities in the proceedings, and if the homeowner borrower cannot locate the party accountable and with authority to correct the irregularity, there certainly could be injury under the CPA. [18]

*18 ¶ 54 Given the procedural posture of these cases, it is unclear whether the plaintiffs can show any injury, and a categorical statement one way or another seems inappropriate. Depending on the facts of a particular case, a borrower may or may not be injured by the disposition of the note, the servicing contract, or many other things, and MERS may or may not have a causal role. For example, in *Bradford v. HSBC Mortg. Corp.*, 799 F.Supp.2d 625 (E.D.Va.2011), three different companies attempted to foreclose on Bradford's property after he attempted to rescind a **mortgage** under the federal Truth in Lending Act, 15 U.S.C. § 1635. All three companies claimed to hold the promissory note. Observing that "[i]f a defendant transferred the Note, or did not yet have possession or ownership of the Note at the time, but nevertheless engaged in foreclosure efforts, that conduct could amount to an [Fair Debt Collection Practices Act, 15 U.S.C. § 1692k] violation," the court allowed Bradford's claim to proceed. *Id.* at 634–35. As amicus notes, "MERS' concealment of loan transfers also could also deprive homeowners of other rights," such as the ability to take advantage of the protections of the Truth in Lending Act and other actions that require the homeowner to sue or negotiate with the actual holder of the promissory note. AG Br. at 11 (citing 15 U.S.C. § 1635(f); *Miguel v. Country Funding Corp.*, 309 F.3d 1161, 1162–65 (9th Cir.2002)). Further, while many defenses would *not* run against a holder in due course, they could against a holder who was not in due course. *Id.* at 11–12 (citing RCW 62A.3–302, .3–305).

¶ 55 If the first word in the third question was "may" instead of "does," our answer would be "yes." Instead, we answer the question with a qualified "yes," depending on whether the homeowner can produce evidence on each element required to prove a CPA claim. The fact that MERS claims to be a beneficiary, when under a plain reading of the statute it was not, presumptively meets the deception element of a CPA action.

CONCLUSION

¶ 56 Under the deed of trust act, the beneficiary must hold the promissory note and we answer the first certified question "no." We decline to resolve the second question. We answer the third question with a qualified "yes;" a CPA action may be maintainable, but the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury.

WE CONCUR: BARBARA A. MADSEN, Chief Justice, CHARLES W. JOHNSON, SUSAN OWENS, MARY E. FAIRHURST, JAMES M. JOHNSON, DEBRA L. STEPHENS, CHARLES K. WIGGINS, STEVEN C. GONZÁLEZ, and Justices.

Footnotes

1 The FDIC (Federal Deposit Insurance Corporation), in IndyMac's shoes, successfully moved for summary judgment in the underlying cases on the ground that there were no assets to pay any unsecured creditors. Doc. 86, at 6 (Summ. J. Mot., noting that "the [FDIC] determined that the total assets of the IndyMac Bank Receivership are $63 million while total deposit liabilities are $8.738 billion."); Doc. 108 (Summ. J. Order).

2 According to briefing filed below, Bain's "[n]ote was assigned to Deutsche Bank by former defendant IndyMac Bank, FSB, and placed in a **mortgage** loan asset-backed trust pursuant to a Pooling and Servicing Agreement dated June 1, 2007." Doc. 149, at 3. Deutsche Bank filed a copy of the promissory note with the federal court. It appears Deutsche Bank is acting as trustee of a trust that contains Bain's note, along with many others, though the record does not establish what trust this might be.

3 While the merits of the underlying cases are not before us, we note that Bain contends that the real estate agent, the **mortgage** broker, and the **mortgage** originator took advantage of her known cognitive disabilities in order to induce her to agree to a monthly payment they knew or should have known she could not afford; falsified information on her **mortgage** application; and failed to make legally required disclosures. Bain also asserts that foreclosure proceedings were initiated by IndyMac before IndyMac was assigned the loan and that some of the documents in the chain of title were executed fraudulently. This is confusing because IndyMac was the original lender, but the record suggests (but does not establish) that ownership of the debt had changed hands several times.

4 In 2008, the legislature amended the deed of trust act to provide that trustees did not have a fiduciary duty, only the duty of good faith. Laws of 2008, ch. 153, § 1, codified in part as RCW 61.24.010(3) ("The trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust."). This case does not offer an opportunity to explore the impact of the amendment. A bill was introduced into our state senate in the 2012 session that, as originally drafted, would require every assignment be recorded. S.B. 6070, 62d Leg., Reg. Sess. (Wash.2012). A substitute bill passed out of committee convening a stakeholder group "to convene to discuss the issue of recording deeds of trust of residential real property, including assignments and transfers, amongst other related issues" and report back to the legislature with at least one specific proposal by December 1, 2012. Substitute S.B. 6070, 62d Leg., Reg. Sess. (Wash.2012).

5 At oral argument, counsel for Bain contended the reason for MERS's creation was a study in 1994 concluding that the **mortgage** industry would save $77.9 million a year in state and local filing fees. Wash. Supreme Court oral argument, *Bain v. Mortg. Elec. Registration Sys.*, No. 86206–1 (Mar. 15, 2012), at approx. 44 min., *audio recording by* TVW, Washington's Public Affairs Network, *available at* http://www.tvw.org. While saving costs was certainly a motivating factor in its creation, efficiency, secondary markets, and the resulting increased liquidity were other major driving forces leading to MERS's creation. Slesinger & McLaughlin, *supra*, at 806–07.

6 *Available at* http:// / www.npr.org/blogs/money/2010/09/16/129916011/before-toxie-wastoxic.

7 MERS insists that borrowers need only know the identity of the servicers of their loans. However, there is considerable reason to believe that servicers will not or are not in a position to negotiate loan modifications or respond to similar requests. *See generally* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 Wash. L.Rev. 755 (2011); Dale A. Whitman, *How Negotiability Has Fouled Up the Secondary **Mortgage** Market, and What To Do About It*, 37 Pepp. L.Rev. 737, 757–58 (2010). Lack of transparency causes other problems. *See generally U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 941 N.E.2d 40 (2011) (noting difficulties in tracing ownership of the note).

8 Perhaps presciently, the Senate Bill Report on the 1998 amendment noted that "[p]ractice in this area has departed somewhat from the strict statutory requirements, resulting in a perceived need to clarify and update the act." S.B. Rep. on Engrossed Substitute S.B. 6191, 55th Leg., Reg. Sess. (Wash.1998). The report also helpfully summarizes the legislature's understanding of deeds of trust as creating three-party **mortgages**:

> **Background:** A deed of trust is a financing tool created by statute which is, in effect, a triparty **mortgage**. The real property owner or purchaser (the grantor of the deed of trust) conveys the property to an independent trustee, who is usually a title insurance company, for the benefit of a third party (the lender) to secure repayment of a loan or other debt from the grantor (borrower) to the beneficiary (lender). The trustee has the power to sell the property nonjudicially in the event of default, or, alternatively, foreclose the deed of trust as a **mortgage**.

Id. at 1.

9 *Available at* http:/ /www.leg.wa.gov/CodeReviser/Pages/bill—drafting—guide.aspx (last visited Aug. 7, 2012).

10 Wash. Supreme Court oral argument, *supra,* at approx. 34 min., 58 sec.

11 Several portions of chapter 61.24 RCW were amended by the 2012 legislature while this case was under our review.

12 At oral argument, counsel for MERS was asked to identify its principals in the cases before us and was unable to do so. Wash. Supreme Court oral argument, *supra,* at approx. 23 min., 23 sec.

13 The record suggests, but does not establish, that MERS often acted as an agent of the loan servicer, who would communicate the fact of a default and request appointment of a trustee, but is silent on whether the holder of the note would play any controlling role. Doc. 69–2, at 4–5 (describing process). For example, in Selkowitz's case, "the Appointment of Successor Trustee" was signed by Debra Lyman as assistant vice president of MERS Inc. Doc. 8–1, at 17. There was no evidence that Lyman worked for MERS, but the record suggests she is 1 of 20,000 people who have been named assistant vice president of MERS. *See* Br. of Amicus National Consumer Law Center at 9 n. 18 (citing Christopher L. Peterson, *Two Faces: Demystifying the* ***Mortgage Electronic*** *Registration System's Land Title Theory,* 53 Wm. & Mary L.Rev. 111, 118 (2011)). Lender Processing Service, Inc., which processed paperwork relating to Bain's foreclosure, seems to function as a middleman between loan servicers, MERS, and law firms that execute foreclosures. Docs. 69–1 through 69–3.

14 MERS string cites eight more cases, six of them unpublished that, it contends, establishes that other courts have found that MERS can be beneficiary under a deed of trust. Resp. Br. of MERS (Selkowitz) at 29 n. 98. The six unpublished cases do not meaningfully analyze our statutes. The two published cases, *Gomes v. Countrywide Home Loans, Inc.,* 192 Cal.App.4th 1149, 121 Cal.Rptr.3d 819 (2011), and *Pantoja v. Countrywide Home Loans, Inc.,* 640 F.Supp.2d 1177 (N.D.Cal.2009), are out of California, and neither have any discussion of the California statutory definition of "beneficiary." The Fourth District of the California Court of Appeals in *Gomes* does reject the plaintiff's theory that the beneficiary had to establish a right to foreclose in a nonjudicial foreclosure action, but the California courts are split. Six weeks later, the third district found that the beneficiary was required to show it had the right to foreclose, and a simple declaration from a bank officer was insufficient. *Herrera v. Deutsche Bank Nat'l Trust Co.,* 196 Cal.App.4th 1366, 1378, 127 Cal.Rptr.3d 362 (2011).

15 *See* 18 Stoebuck & Weaver, *supra,* § 17.3, at 260 (noting that a deed of trust "is a three-party transaction in which land is conveyed by a borrower, the 'grantor,' to a 'trustee,' who holds title in trust for a lender, the 'beneficiary,' as security for credit or a loan the lender has given the borrower"); *see also U.S. Bank Nat'l Ass'n v. Ibanez,* 458 Mass. 637, 941 N.E.2d 40 (2011) (holding bank had to establish it was the **mortgage** holder at the time of foreclosure in order to clear title through evidence of the chain of transactions).

16 Wash. Supreme Court oral argument, *supra,* at approx. 8 min ., 24 sec.

17 The trustee, Quality Loan Service Corporation of Washington Inc., has asked that we hold that no cause of action under the deed of trust act or the CPA "can be stated against a trustee that relies in good faith on MERS' apparent authority to appoint a successor trustee, as beneficiary of the deed of trust." Br. of Def. Quality Loan Service at 4 (Selkowitz). As this is far outside the scope of the certified question, we decline to consider it.

18 Also, while not at issue in these cases, MERS's officers often issue assignments without verifying the underlying information, which has resulted in incorrect or fraudulent transfers. *See* Zacks, *supra,* at 580 (citing Robo–Signing, Chain of Title, Loss Mitigation, and Other Issues in **Mortgage** Servicing: Hearing Before Subcomm. on H. and Cmty. Opportunity H. Fin. Servs. Comm., 111th Cong. 105 (2010) (statement of R.K. Arnold, President and CEO of MERSCORP, Inc.)). Actions like those could well be the basis of a meritorious CPA claim.

End of Document

Exhibit 45

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Q. Maybe I'll rephrase it.
Do you perceive any difference between the owner of a loan and the holder of a Promissory Note?
A. Well, in the case of Fannie Mae, for example, Fannie Mae is always the owner and holder. The established rule of holder and owner is that you don't necessarily have to be the owner to be the holder.
Is that your question?
Q. Yeah. I mean, I just want to understand your - what your Expert opinion is, and what your understanding is, with respect to - here's my struggle: I'm understanding you to say that the securitization of these loans are being sold, and the securitization - and sold to investors - and that these - is it fair to say that your contention is that these investors actually own the loan?
Is that a fair assessment?
A. You cannot broadly answer a question like that. You must go to the specific transaction, because different cases have to be dealt with differently.
Q. Okay. That's fair enough. So in Mr. Renshaw's case here, then - why don't we go ahead and pull out Exhibit 2.

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If you could, Catherine, provide Exhibit 2 to Mr. Kahn.
And I'll represent to you, Mr. Kahn, that this is the - this is a true and correct copy of the interest only period adjustable rate Note with all allonges and endorsements provided to me by GMAC Mortgage, LLC.
Do you want to just take a minute to look that over?
A. I have examined this document.
Q. Okay.
A. It might appear to a novice that this is a legitimate document, but it's not.
Q. Okay. Can you explain that for me?
A. Well, if you go to Freddie Mac's Selling Guide - I think it's Section 16.4 - you'll find that this allonge doesn't meet the guidelines.
First of all, it's not attached.
Second of all, it identifies a different loan number. The loan ID of 19604557 is not the loan number of the loan. It appears to be little bit doctored from the line items of pool, note date, borrower name, property address - you'll note that borrower name and property address don't have the same format line spacing, which they should normally

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have. It's double spaced. And then that seems to be one and a half spaced.
The use of a handwritten number on the top of an allonge is what I consider to be bogus. But it's what Freddie Mac will consider. The last - and the investor number is not correct. You want to run - and the endorsement is to GMAC. And that is not - but somebody has doctored this. The chain of endorsements is wrong. If you look - you sent over an Exhibit, if I may, that had the Mins; right - the Min Milestone Report.
Do you have that here?
Q. Yes.
A. What Exhibit was that?
Q. That is Exhibit 4. Why don't we go ahead and pull that out?
A. Hold on a second. Thank you for providing the typed Exhibits. Let me see. If you look at the - this is Exhibit 4. If you go to Page 1, 2 - the last page. Hold on a second. It would be - it's not the last page. On the bottom, it says HF000600.
Q. Okay.
A. Okay. So it's the Milestone Report. You'll look at that Milestone Report and, in the second row column from the bottom, you will see that

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the old investor was Residential Funding.
Q. Okay.
A. Then you will go up. Excuse me. That would be the very bottom row - Residential Funding. Then you'll go up, and you'll see the sale, which was Residential Funding to Freddie Mac.
Q. Okay.
A. If you go, now, back to your bogus note allonge, you will see - oh, by the way, in the Milestone, going back to the Milestone, you'll see that GMAC is a servicer - a sub-servicer.
Q. Uh-huh.
A. If you go to your Promissory Note allonge, which was Exhibit 2, you'll see, first of all, an incorrect endorsement to GMAC Mortgage, the servicer. They've endorsed this Note to the servicer.
Q. Uh-huh.
A. When you sell - if you look at Freddie Mac, when you convey a loan to Freddie Mac, according to the guidelines, in the Endorsement Section of their guidelines, it is very specific that the endorsement is going to be from the last owner or depositor which, in this case, is Residential Funding to blank. And Freddie Mac takes

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the buyer, which it's evidenced here that it is.
And then the endorsement would be from Residential Funding, in blank.
Q. Right. So --
A. It's not there.
Q. -- as I just described, if you take out the special endorsement, the GMAC Mortgage, LLC, stamp, and you also remove the GMAC Mortgage blank endorsement, it would comply with Freddie Mac's Guidelines; is that correct?
A. No. If you want to roll back the camera, I said that the allonge doesn't meet the guidelines of the 16.4 Selling Guide of Freddie Mac. It's a different loan number.
Q. Explain that again.
A. It's a different loan number. Forget about the handwritten, unidentified party scribble at the top. The allonge is typewritten and barcoded. The known number in the allonge that's typewritten and barcoded doesn't resemble any loan number associated with this transaction.
ResCap is one of the largest securitizers of trillions of dollars of loans. They have millions of these things. Anybody could attach this to anything. This, in specific, is from another

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loan. You can read it right there.
None of the loan numbers - and if you go to the MERS Milestone, and the Min, and the documents, is that loan number. It's being put here to make somebody like a Judge, or somebody that isn't experienced in this industry, to seem to be legitimate. But it's not.
It's not attached to the document - but the use of a random written loan number on top of a printed incorrect loan number is bogus.
Q. Okay. So when you say it's not attached to the documents --
A. That's --
Q. -- I mean, is it a problem that it's a separate page?
A. That's insignificant to the fact, in this case, that it's a completely different loan number. It's a completely different loan number.
Q. Okay. So the reason you believe this to be fraudulent is because of the loan ID number at the top here - the printed loan ID number does not match any loan ID number in the Note?
A. The reason I feel it's fraudulent is - multiple issues here.
Number one, according to the guidelines,

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it should be attached. I don't see that it's attached but, leaving that to the side for a second, it identifies a different loan number typed in to the document.
Q. Okay. But all of the rest of the information is correct to the best of your knowledge; right?
A. It is not.
Q. The loan amount, note date, borrower name?
A. It is not. The chain of endorsement is absolutely wrong.
Q. Well, setting aside the chain of endorsement, I'm talking about the identifying information at the top of the allonge, the rest of that information - note date, loan amount, borrower name, property address - that's all correct to the best of your knowledge; right?
A. I - you've given me a fraudulent document, a document that has been drawn to misrepresent. And you're asking me if certain line items within the body of that document may be correct. And my attention is to the obvious fraud and misrepresentation.
First, the sale identified by the Freddie Mac claim of ownership is the ResCap endorsement to

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Freddie Mac in blank.
Q. Okay.
A. Freddie Mac would be the party that would endorse the loan to GMAC. When ResCap sold the loan to Freddie Mac, they now own it. So if you own something, like the title to your car, or anything else, you wouldn't go back to the party who sold it to you to now endorse it to the party you want to sell it to. You, yourself, would endorse it to the new party.
This is a fabricated endorsement in many - -
Q. Okay. Fair enough.
MR. STEELE: Just a second. Let Mr. Kahn answer, please.
THE WITNESS: And I'll tell you something else. There's a numbered series on the bottom of these documents, an HF number, that if you look at the Mortgage supplied to me originally, the Note doesn't have any of those numbers.
So I don't know how the copy that you have supplied to me has additional printed numbers over the original, which just had the Homecomings Financial endorsement that I examined in the process of my Stage One Report.

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Q. Yeah. That is what I was asking. Yes.
A. I don't know that - I can't - I've already told you I'm not an Attorney. I don't know --
Q. Okay. That's fair enough.
A. I don't know the --
Q. And my next question was about the UCC. Are you familiar with the endorsement requirement in the Uniform Commercial Code?
A. I am familiar with UCC-3 and UCC-9.
Q. Okay. Now, are you familiar with the endorsement requirements under UCC-3?
A. I am not going to respond further to you about the illegitimacy of a fabricated, obviously fraudulent endorsement, and whether or not a fraudulent, fabricated endorsement is going to be compliant under any rule at all. It's fraudulent.
Q. Well, that's kind of what we're here about. You're alleging fraud without actually - there's no basis for the allegation.
A. The allegation --
Q. I mean, I understand you've testified to the facts about - you've testified to the facts of the problems you see here, but you're drawing a conclusion that it's fraudulent, and it seems that you don't even - it seems to me that this issue over

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endorsement is made based upon an understanding of the UCC's endorsement requirements, but you aren't willing to speak to those issues because it's a legal issue.
So what I'm asking you is, if you're not going to opine on legal issues like the requirements of endorsement under the UCC, how can you draw the conclusion that it's a fraudulent document?
A. Well, that's relatively simple. Freddie Mac claims ownership. The MERS Milestone you provided in to evidence confirms the chain of ownership from ResCap - excuse me - from Homecomings to ResCap, and Freddie Mac claims ownership.
So the endorsements that we expect to see are Homecomings, stamped Residential Funding - which we see; and then Residential Funding, in blank, and then Freddie Mac - and that's what we see.
Now, what you're showing is, somehow, that GMAC - that Freddie Mac, who securitized this loan under the Government sponsored enterprise rules and guidelines allows, or presumes, for GMAC, or for Residential Funding, to endorse it to GMAC is preposterous.
Now, let me say something to you: The issue of misrepresentation in the documents - this

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document and that transaction in that manner - and the extrinsic nature of preventing the truth from coming out, the Note evidences what is called defects and conveyances according to Freddie Mac.
Freddie Mac requires the sellers to repurchase such loans at full face value. GMAC is apparently servicing the loan because your Milestone reports that. And ResCap and MERS are the interim parties as nomineed by the assignment from Homecomings, which is also an affiliated company.
MERS specifically authorized the servicer's employer - well, listen, Freddie Mac must comply with their guidelines. And so if we were to see that GMAC was going to be the new owner of this Note, that would then be Freddie Mac to GMAC.
If Freddie Mac, which they can, wanted to provide to its servicer, or sub-servicer, which they can, documentation upon which to conduct a foreclosure, which they can, the documentation that they would provide would not be endorsed to them.
It would be Freddie Mac's holder in due course, originals, documentation, made out to them. And then the holder, meaning the servicer of Freddie Mac's properly endorsed and owned documentation, would be able to conduct a foreclosure, and Freddie

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Mac would be a party to that.
They authorized services to conduct the foreclosure, but the way you've presented it, you don't even recognize why. And it's for something that has to do with your Trustee - your Substitution of Trustee, and that chain.
But this document is not what the holder, who was wishing to do anything, would provide. You wouldn't provide the Note signed over to the car dealer in order to service your car. You'd just give them a copy of your Note, or you'd give the original, if it was valuable under certain circumstances like that.
That's what I would expect to see - a true, honest foreclosure in this case, if GMAC was the servicer, which let's agree they are - it's in the MERS Milestone - and then what we would see would be the pay to the order of, in blank, from Residential Funding.
Q. Okay.
A. I mean, this is simple. You know, you're making it very complicated.
Q. I'm not. And I think perhaps the confusion arises because - I will represent to you that GMAC Mortgage did buy back this loan from

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Freddie Mac in order to be able to offer Mr. Renshaw a modification during the course of this litigation. And because Freddie Mac - he did not meet Freddie Mac's requirements to provide him with a modification.

So they actually bought it back, and maybe that's why we have this additional endorsement from GMAC Mortgage, LLC, and then an endorsement in blank.

Now, I understand from your prior testimony that you would expect to see a pay to the order of Freddie Mac from Residential Funding, and then a separate pay to the order of GMAC Mortgage from Freddie Mac. Is that fair?

A. It would be pay to the order of, in blank. That's what the Freddie Mac guideline is. You could make it to Freddie Mac, but the guideline is in blank. The incongruent aspect of what you're stating is - and I don't see that reflected in the MERS Milestone, and I still see Freddie Mac claiming ownership of this loan, so --

Q. Well, fair enough.

MR. STEELE: Let Mr. Kahn finish, please.

THE WITNESS: I consider what you're stating to be a bald claim. But I'd have to see it

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in evidence. What I see here is fraudulent because Residential Funding sold the loan to Freddie Mac.

Why is Residential Funding stamping the loan to GMAC? That is illegitimate. It's a mistake. It often happens in document fabrication.

BY MR. McGEE:

Q. Well, I guess - and to be clear, I understand what you're saying. Residential Funding Company should have - now, okay. Let me ask it a different way.

A. I'd like you to pause for a second, because I want to be clear. The questions and the line of questioning that you're asking me may tend to lend legitimacy to the allonge to the Promissory Note because that is where this Residential Funding endorsement is that we are speaking back and forth here about.

But I've already stated to you that I believe that that document, in itself, is fraudulent because Freddie Mac would never have - this did not meet the guidelines upon which Freddie Mac could buy it. It's got the wrong loan number on it.

This is a - this was a blank endorsement from some other loan in the millions and tens of millions of loans that Residential Funding has

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conducted.

Q. Okay. So let's go down that line. If that, in fact, is the case, what results?

A. What results is that - technically speaking, what would result from the Freddie Mac Guidelines would be the discovery that this was a defective loan conveyance, and Freddie Mac would sell - one of the parties here would have to buy that loan back from Freddie Mac, and then they could do with it what they wanted.

Q. So is it your Expert opinion that if we disregard this allonge, the Note may still be enforceable?

A. As I've said to you before, an illegitimate document is an illegitimate document. If a Note is properly endorsed, it would be enforceable. If a Note is fabricated, falsified, forged and misrepresented, then it is unenforceable.

If the example is, well, what if I roll it back and make it enforceable, well, I guess then it would be enforceable. But, in this case, it's not. And there is a reason why MERS has done this? MERS has done this premeditatively, in my opinion, but the facts speak to themselves.

MERS has made a very big mistake here that

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you haven't touch on.

Q. And what would that mistake be?

A. That mistake - well, let me think for a moment. First of all, they have committed what is an act that is prohibited under their rules. Let me get something out of my case file, if I have it on MERS.

Q. This may help you. Deposition Exhibit 5, if we could get that in front of you, those were the rules - I will represent to you that those are the rules in effect when Mr. Renshaw's foreclosure was initiated, if that helps you out at all.

A. Those rules do not - those rules that you submitted are self-serving to your cause, but they do not address the infraction that I have discovered. And I'll address to you the MERS writings that pertain to my finding in a moment, if you'll allow me.

Hold on one second. I have to go in to my MERS folder if you don't mind. May I access my MERS library folder?

Q. Sure. I would ask that you provide anything that you're going to review to Mr. Steele, or myself --

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A. Okay.
Q. -- you know, after the Deposition.
A. Okay. I'll create a different - MERS issued a - what's called an Ohio Federal Court Opinions and Orders in Mortgage Foreclosure Actions writing. It was a notice --
Q. Did you say Ohio?
A. It's in Ohio. And I'm raising this issue because it says, "Two fundamental elements that must be pled at the commencement of a foreclosure action is that Plaintiff is the holder, and Plaintiff is the mortgagee of the mortgage that's being foreclosed."
So what you've got here is, MERS is making a claim by the blank endorsement of GMAC that MERS is the owner and holder of the Note, and the Mortgagee under the Deed of Trust. That's why they've done that. That's why they modified it, because the Substitution of Trustee is done as if MERS was the lender.
Q. Okay.
A. Normally, if MERS was not doing that, had not made that critical mistake, which is misrepresentation because they've doctored this whole thing and now they got caught red-handed, what

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they would have done is make an assignment first. MERS would assign to somebody to a party. But they didn't do that.
They're taking actions in - against the MERS rules, and representing that they're the owner, holder, of the loan, and substituting a Trustee who has taken Trustee actions against the interests of this borrower.
Q. Okay. Now, I want to be clear about something.
Is it your contention based on the documentation that MERS is representing it is the owner of the loan in addition to being the holder of the Note?
A. Well, if you go to the Substitution - where is your Substitution Exhibit?
Q. It's Exhibit 6. Catherine, go ahead and hand him Exhibit 6.
A. Hold on one second. There are some critical problems with this Appointment of Successor Trustee upon which all related actions have rippled down.
First of all, the first paragraph states that MERS is taking actions for Homecomings. But when you look at the date in 2010, it is after the

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date that the loan was sold, and Homecomings was no longer the owner.
Residential - I'll call it ResCap - was the owner, and/or Freddie Mac was the owner. If I was a novice to read this - maybe somebody that is not able - you know, doesn't have the experience would read this, and it would look like MERS is taking beneficial ownership interest actions on a Note and Mortgage Deed of Trust which is not - which it has rights to do because, under the MERS rules, if MERS is in possession of a Note endorsed to the holder in blank, then it can do that.
So MERS could do that, except for one thing. In this case, it's been fabricated, and we've gone through that. But had MERS been holding a Note that was - you know, they were now holding a Note endorsed in blank, well, then, they could take an action to substitute a Trustee. If you go in to the Deed of Trust, only the Lender can - typically, in Deeds of Trust, only the Lender can substitute a Trustee.
A servicer, or an electronic registration system designed to facilitate the recordation of services and transfers of the Deed of Trust, itself, cannot - is not the Lender.

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Besides, this Lender, if you look at the FDIC report and investigation, this Lender had ceased to do any lending business in 2009, according to the evidence of the FDIC investigation.
So MERS is taking actions for a party who is not the owner, because the endorsed Note is different, at a date after that party is basically defunct in terms of lending, and is - wants us to believe that it has the rights, this employee of GMAC, Donna Fitton, and the other employee, Sally Beltran, which I'm very sure Sally's Notary address is that of GMAC.
These are GMAC employees. They're now taking actions based upon that bogus endorsement to GMAC. But ResCap never had the rights to transfer the loan they already sold to Freddie Mac to GMAC. So that's why it's bogus. Somebody just stamped it on there in purple ink.
Q. Okay. So if I'm understanding you correctly - and please correct me if I'm wrong - Donna Fitton, who executed this Appointment of Successor Trustee as an Assistant Secretary of Mortgage Electronic Registration Systems, did not have authority to execute this appointment because the loan was owned by Freddie Mac; is that correct?

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THE WITNESS: Excuse me --
BY MR. McGEE:
Q. So, Mr. Kahn, having heard that exchange, is it possible that Freddie Mac authorized GMAC Mortgage, when they sold GMAC Mortgage the loan - which I will represent was within the last three or four months - is it possible that they said, go ahead and stamp it to GMAC Mortgage; we don't need to execute a separate endorsement from Freddie Mac?
A. You know, when I'm confronted with a request, I guess, at a Deposition to identify a reliable authority like you're asking me to do, I really think that I can say that I need to determine whether a particular aspect is reliable on that point.
And I have mentioned to you - because you're trying to give credibility to documentation I don't believe Freddie Mac would have purchased, or would have been proper documentation.
In other words, it's an allonge to another completely different loan. Would Freddie Mac have a completely different loan's allonge making an endorsement to GMAC; is that your question?
Q. My question is: Would Freddie Mac, assuming they owned the loan and sold the loan to

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GMAC Mortgage, is it possible that they authorized GMAC Mortgage to simply stamp it, to specially endorse it to GMAC Mortgage so that GMAC Mortgage took possession and ownership of the Note?
MR. STEELE: Let me ask something. Mr. McGee, you said this just happened in the last three or four months. Is that what your statement was?
MR. McGEE: Yes.
MR. STEELE: So the transfer - you're saying that Freddie Mac transferred Mr. Renshaw's loan to GMAC within the last three or four months?
MR. McGEE: It's reflected in an Affidavit. I think - I mean, we're a little off topic here, but yes.
MR. STEELE: And when did that happen?
MR. McGEE: That happened when we were trying to get you a loan modification because Freddie Mac refused to - they twice rejected your client's application for a loan modification.
And they were trying to work with you and get you the best deal possible, so they purchased the loan in an effort to provide you with a loan modification option. And so, at present - and this is all reflected in an Affidavit.
I can point it out to you at a later time,

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but they purchased the loan in order to offer him a loan modification.
MR. STEELE: And so?
MR. McGEE: And that's, perhaps, part of - you know, I understand that Mr. Kahn's testimony is that this Note is just simply fraudulent on its face, but what I was getting at earlier, and what I was trying to describe, is that perhaps this endorsement to GMAC Mortgage - because this is the current original Note - reflects that sale, that recent sale from Freddie Mac to GMAC.
THE WITNESS: Well, you know what? That makes it much easier for me to answer.
BY MR. McGEE:
Q. Okay.
A. And that would be that, if that was the case, let's see the bank statement wire for the loan payable at the time of transfer, and couple that to the documentation, and submit that. Then I would be able to analyze that a little better.
Because a bald claim upon already presumptively fabricated documentation to exhibit to be credible is not enough at this point.
Q. Yeah. And I understand your position, but you certainly aren't contending that an endorsement

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on a negotiable instrument is nothing more than a bald claim; are you?
A. Hold on one moment. I need to reference something.
MR. STEELE: Mr. McGee, let me ask you: All these endorsements are undated. Which endorsement is the last endorsement?
MR. McGEE: Well, I mean, maybe we can speak with Mr. Kahn about it, but it looks to me like there's a blank endorsement on the signature page from GMAC Mortgage; right?
I mean, so if you follow the chain of those holding the Note, whoever holds this Note - based on my understanding of the UCC, whoever holds this Note is entitled to enforce it because it's a blank endorsed Note.
Is that your understanding, Mr. Kahn?
THE WITNESS: If the chain of endorsement is legitimate from party to party, and not contradicted to the legality, I would say that it would be - I can't give a legal opinion, but --
BY MR. McGEE:
Q. I understand.
A. -- but I would say that a Note that's

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to take action for the Lender. What I understand you to be doing is saying, well, only the Lender can do a Substitute Trustee.

But then, if you turn to Page 3 of the document, it provides that the Lender can have MERS take certain actions. So I'm just asking you to maybe comment on that issue, and then I think that's part of why I ran you through the text of the document - is to test whether you really are looking at all of the angles here.

So I suppose my question is, in light of the fact that a Lender can have MERS take certain actions in its name, does that change your analysis with respect to this Paragraph 24?

A. You really have to go to the MERS Rules - because I don't make the rules. MERS is a membership organization, and MERS makes the rules.

Q. I understand, but you also have to understand that the MERS Rules are not - they don't apply to Mr. Renshaw, and that's not what this litigation is about. This litigation is about Idaho law and violation of Idaho law.

So to the extent you need the MERS Rules to do your forensic analysis, I would - I mean, you can certainly refer to them, and go ahead and do so.

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I'm just telling you, the MERS Rules are not on Trial here.

A. But what I'm trying to say is that - I think it's already been well settled that, MERS here would be claiming to be acting for Homecomings. That's what it says. Homecomings had, according to the FDIC, stopped lending in 2009, a time before this had happened. So MERS requires written instruction, to my knowledge - written instruction from the Lender.

So are you saying that the Lender gave written instruction to MERS to do this? Well, according to this, Homecomings was not a Lender, and ResCap had already bought it and sold it to Freddie Mac. I don't see those parties involved here giving MERS any written or otherwise directed.

MERS' stated Rules require direction by the Lender or their assigns, directing them to convey land title, or Deed of Trust, or whatever. And how could they provide written instruction to MERS, or this party, Donna Fitton, or to anybody, to transfer titles to Deeds they no longer own?

I think it's an intentional and direct fraud on the Court, and on the party that's being foreclosed upon. That's what I think.

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Q. Fair enough. So we've got Exhibit 9 in front of you. Why don't we just go ahead and - let's get Exhibit 8 in front of you, as well, and we'll start with Exhibit 8.

A. Exhibit 8 is --

Q. Exhibit 8 appears to be a Forensic Lender Discovery Document Review and Assessment dated December 22nd, 2010. Do you have that in front of you?

A. Yes.

MR. STEELE: Mr. McGee, can I ask - just to interject something here. Any time, Mr. Kahn - we've been at this for how long? An hour; is that right?

MR. McGEE: It looks like, actually, a couple of hours.

MR. STEELE: A couple of hours?

MR. McGEE: Do you need a break?

MR. STEELE: I was going to ask. Yeah, a break is sometimes a good idea.

MR. McGEE: Okay.

MR. STEELE: Could we take about a five-minute break, or maybe make it a ten-minute break so that everyone can take care of a few items, and we'll get back together; is that all right?

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MR. McGEE: Sounds good to me.

(Thereupon, a brief recess was held off the record.)

BY MR. McGEE:

Q. All right. So we're back on the record here. I had - before we went out, I'd asked Ms. Fitzpatrick to hand Exhibit 8 to the witness.

And, Mr. Kahn, this is your Forensic Lender Discovery Document Review and Assessment; is it not?

A. Yes. Yes, sir.

Q. Does it appear to be a true and accurate copy?

A. Exhibit 9?

Q. Exhibit 8.

A. Yes. This is just an Assessment. It really shouldn't be in the Court. It's not designed for submission in to Court - I guess that it is. It's just the preliminary - would you like to know what it is?

Q. Yeah. That would be great.

A. Some years ago, because there is a cottage industry of pretender auditors and experts around the Country, rather than just take any old case that is willing to throw their money at us - which is

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when you say that the original lender on the initial original mortgage was paid in full?
A. You know, it's a surprise to a lot of people how Fannie Mae and Freddie Mac work. When you perform a loan prospector, or desk type underwriter type of inquiry to Freddie Mac, or Fannie Mae, and you get approval for a loan, that means that Freddie Mac, upon satisfaction, or Fannie Mae - it's the GSEs - will fund your loan in full, plus your profit. And that's the basis of the secondary market.
That was established initially in the 1900s to stimulate lending in America. Up until that point, banks had to lend their own money and sit with a loan as a liability. In this case, the GSEs buy the loan, and fund them in full, plus profit, to the lender so that the lender can go out and make more loans.
It has to do with the capital ratios of the banking industry inasmuch as lenders cannot just keep lending money unless they have a source of replacements for the money. So the loan is taken off the balance sheet of Homecomings, and Homecomings was paid in full.
They pretty much, you might say, brokered

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the loan - even though they may have had the label of lender, they weren't actually lending their money in the traditional sense of portfolio lending. So Freddie Mac, when they bought it at the origination - ResCap, in this case, just for your own information, would be acting, or could have been acting as a warehouse lender in the interim. But we don't know that.
We only know that Freddie Mac, Fannie Mae, when you originate a loan, those lenders get paid in full at the time of loan origination.
Q. Okay. So it's not your contention that the loan is paid off as to Mr. Renshaw; correct?
A. No. Mr. Renshaw - the loan was sold. Homecomings was paid off.
Q. Okay.
A. So Homecomings sold all - when they sell, they sell all beneficial rights, title and interest. So just in case the seller, like Homecomings, goes bankrupt, there's no claim on the buyer. That's why there's no beneficial interests that remain to any party on the original initial documents.
That would be an assign, or a subsequent holder - an owner and holder in due course.
Q. Okay. Why don't we go ahead and turn to

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Exhibit 9. This is a document identified as Forensic Lender Discovery, Stage One Loan Securitization Audit Report. Does Exhibit 9 appear to be a true and correct copy of that report?
A. Yes.
Q. Obviously, with the express caveat that you may have attached your Affidavit to this report, which is Deposition Exhibit 10.
A. Sounds good. Yes. That's my Affidavit of Experience and Truthfulness. I'm reading here about O. Max Gardner on Page 6 of my Affidavit, and I'm so sad about his liver cancer now.
Q. I'm sorry?
A. I guess I should say off - can I say something off the record?
MR. McGEE: Sure.
(Thereupon, a discussion was held off the record.)
BY MR. McGEE:
Q. Okay. So are we back on the record?
A. Yes.
Q. All right. Let's go ahead and turn to - it looks like Page 3 of your report. At the top, it says Executive Summary and Statement of the Expert.
Are you there?

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A. Could you give me the page again?
Q. It's designated Page 3 in your report. It's Plaintiff's 03019 at the bottom right corner.
A. Okay. I'm there - Page 3.
Q. Okay. I'm just going to - we're going to go through these nine numbers here, and I'm going to ask you a couple of questions about each.
It provides on Lines 1 and 2 that, based upon your personal investigation and the facts discovered, you'll be able to testify that Mr. Renshaw's loan has been securitized; is that accurate?
A. Yes. The Act of Freddie Mac claiming - yes.
Q. Okay. So the basis of your opinion that the loan has been securitized is because Freddie Mac is claiming ownership to the loan, or claimed ownership to the loan?
A. No. The basis of it being securitized is what Homecomings Financial did. They securitize their loans through ResCap. ResCap, if you look at their annual report filings, they are at the top of the food chain in securitizations. They securitize trillions of dollars of mortgages. And I probably specified it in this report.

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Q. Yeah. I think we'll get there. I just want to get a general idea about, you know, the basis of your opinion that the loan has been securitized. I kind of wanted to figure out from you if you have evidence specific to Mr. Renshaw's loan, or if it's basically in light of the parties involved with the loan.

Would you characterize your opinion as one based on the parties involved - i.e., Freddie Mac, Homecomings, ResCap - or would you base it on evidence you discovered related to the loan, itself?

A. I think I included the claim, in writing, of Freddie Mac to owning this loan. If not, I have that - oh, yeah. Here it is; it's in here. Yes, our records show that Freddie Mac is the owner of your mortgage. That means, by definition, that the loan has been securitized.

Q. Okay. That's all I was asking.

A. That is, to Mr. Renshaw's loan.

Q. Okay. So let's move on to Number 2. You state that you can testify that subsequent sales, or transfers of the loan, have not been revealed.

Can you tell me - well, first, what does that mean, exactly?

A. Well, you've provided the evidence in

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support of that. At the time, the documentation that I reviewed had only a Homecomings endorsement. Now you've come back with subsequent endorsements on the way to Freddie Mac, and now they purport to go further, or whatever.

But I knew that Homecomings - from the investigation, there's more to it than has been shown to us. And you have provided some subsequent evidence to support that claim.

Q. Okay. And is it your Expert opinion that the failure to reveal subsequent sales, or transfers, impacts the enforceability of Mr. Renshaw's loan at all?

A. I can't comment on the legal account of whether or not it impacts his loan, legally. But I expect, and I believe the Judges that I've had the privilege and honor of being before, expect truthfulness and voluntary disclosure in matters that come before them.

And so I make the statement that I didn't think that the full disclosure, at that time, had been made to me - and I was right.

Q. Okay. So let's move on to Number 3. You state that you can testify that Mr. Renshaw's Note and Deed of Trust, Sub A, have been paid in full.

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Can you tell me what you mean by that statement? Is that what you just stated about Homecomings having been paid in full, or has the loan been paid in full as to Mr. Renshaw, in your opinion?

A. Well, Homecomings was paid in full by Freddie Mac.

Q. Okay.

A. Freddie Mac was paid in full by the investors.

Q. Okay.

A. Who, at this point, are undisclosed. That's the way securitization works.

Q. Okay.

A. The Freddie Mac interest and principal, or whatever, that the taxpayer pays up, has been demonstrated by, I don't know, what is it - $400 billion, or a couple to a few hundred billion dollars being paid by the Treasury - Federal Reserve?

Q. Okay. So I guess my question - maybe to be more pointed - is, is it your opinion that Mr. Renshaw no longer has to pay off the Note as a result of what you've described?

A. No. That wasn't what I was stating here.

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Q. Okay.

A. Now, since you're asking me about that question, I will say that, if a Note has been paid off - I guess I could do it by an analogy, since you said that you were kind of green.

If you've paid off something to one party, and they show you copies of it and demand payment on it, do you have to pay it off again is the question - and, to answer that, I say it's already been paid off.

So Homecomings was paid off; Freddie Mac was paid off. We don't know the status - because Freddie Mac hasn't divulged, or disclosed, the Trust and the tranches, and the CUSIPs, and the investors, and the status of any cross-collateralized insurances or credit default swaps - whether or not the actual investor on this particular loan was paid off. That is still a missing quotient here.

Q. Okay.

A. If they have all been paid off according to the Note, I believe that it would enure to the borrower - any borrower's credit. In other words, if you had a loan, and I paid it off for any reason, does that still mean you owe money on the loan? And I would have to say that the answer is no.

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If I won the lottery, I paid my friend's mortgage off - my friend didn't pay it off; I paid it off - if your question is, does my friend still owe money on the loan, I think the technical answer to the Note, as a lender, would be no. That would satisfy that loan, and nobody would owe any more money on that particular loan.

Q. Sure. And, again, I just need to clarify this issue. It's not your opinion in this report that Mr. Renshaw is not obligated to pay his Note; correct?

A. I do not have the - nobody has submitted to me the evidence of which I just spoke in order for me to determine whether or not the final, or the investor, has been paid off on this loan. But Homecomings has; ResCap pass; and Freddie Mac has.

Q. Okay. So, again, your opinion is not that Mr. Renshaw is not obligated under the Note; correct?

A. Is that a double entendre - not, not?

Q. It's a double negative, I think, but --

A. Can you rephrase that?

Q. -- so maybe I'll rephrase.

What I'm understanding you to say is that you don't know whether Mr. Renshaw is obligated

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under the Note. You don't have any evidence to suggest that he still does not have to make monthly payments; correct?

A. I do know that the GSEs have received, what, some $250 billion to their investors to pay off bad defaulted loans. I don't know if Mr. Renshaw's loan has been included in that. I'd like to know. Nobody has discovered that, or provided me with that information.

But I am not excluding the possibility - I've told you who I know has been paid off, but if you're asking me, does Mr. Renshaw still owe money on the loan, at this point, I cannot say he does. I know that three of the interim parties have been paid off in full.

I don't know the status of the ultimate holder in due course, because you're not disclosing them, and you're not disclosing the details about it. And I could easily find that out if you did. So it's a possibility.

Q. So your answer is - your answer to my question was no, not at this time?

A. It's a possibility that Mr. Renshaw's loan has been paid off. Mr. Renshaw's loan has been paid off to Homecomings; Mr. Renshaw's loan has been paid

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off to ResCap; Mr. Renshaw's loan has been paid off to Freddie Mac by investors.

What I don't know is, have the investors, in the particular deal that they're in, been paid off by the quarter of a trillion dollars of taxpayer payoffs. I don't know that, so that's a possibility.

Q. Okay. So going back to the example you just gave, if you won the lottery and wanted to pay off my loan, and you made that payment - if you just paid the bank $250,000, that wouldn't necessarily get rid of my obligation.

What I hear you saying is that, if you specifically paid $250,000 for the account of Mr. McGee, that would resolve my debt. Is that what I hear you saying?

A. Well, in my example, if I had paid off your mortgage and satisfied it, that would satisfy the debt, yes. You would own a property - my intention was for you to own a property free and clear.

Q. And, in doing so, you would, in theory, designate the money for my account; correct?

A. Correct.

Q. But getting back to your Executive Summary here, that's not what you meant when you said has

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been paid in full. You weren't speaking conclusively that Mr. Renshaw does not owe any money on a Note. You were speaking as to the obligees - respective obligees - Homecomings, ResCap and Freddie Mac; correct?

A. I didn't know about ResCap at that time.

Q. Okay.

A. Homecomings has definitely been paid off on that Note, and so has every other lender. They don't have any beneficial rights at all. They sold them.

Q. Okay.

A. No party in that Note has any beneficial rights, unless they can prove it.

Q. Okay.

A. That would --

Q. So then Subpart B there states that Mr. Renshaw's Note and Deed of Trust have been separated and, in parens, you have bifurcated. Can you tell me, first, what that means, exactly?

A. Well, when you go in to - in the old days, when you go in to a foreclosure Court, the party would have, let's say, the Note in one hand and the Mortgage in the other.

Q. Okay.

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are residential mortgage servicers, or were at some point.
Q. Okay.
A. And MERS is just a national electronic registry. All it does is track the beneficial ownership, and interest, and servicing rights.
Q. Okay.
A. That's what I understand.
Q. So, again, getting back to this bifurcation idea, I'm really trying to understand what you're saying.
Basically, the evidence suggests that, based on the endorsements, and based on all of the parties that have claimed some interest, whether it's servicing rights, or whether it's beneficial ownership interests, or whatever interests are claimed, this loan has been passed around.
And your contention is that the Deed of Trust, because MERS is always the beneficiary of record, did not follow that Promissory Note, physically?
A. Right. You know, MERS has had a lot of problems with oversight, and the lack of oversight by the supposedly certifying officers. And MERS was the subject of the Department of Treasury, the

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Controller, and the Governors of the Fed, the Federal Reserve System, and the FDIC, and the FHA and, when in business, the Office of Thrift Supervision, that they entered in to a consent order to change those processes. I don't think --
Q. And you know what? I'm sure we can refer to that specific document, as necessary - and I certainly will. But, right now, I think we'll stick with your opinion here.
So let's move on to Number 4. The statement here is that the Trustee documents are faulty.
Can you describe for me what you mean by that statement - because faulty is kind of a vague word, and I'm interested in what you mean by that statement.
A. We've gone over that, the Substitution of Trustee, in detail. I think that it's been asked and answered.
Q. Okay. So that Number 4 relates to the Appointment of Successor Trustee?
A. Exactly. I believe there's another Trustee action, in addition, but it definitely relates to the - when a Trustee - because in the Appointment of the Successor Trustee, a Successor

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Trustee was appointed.
By the way, I think that that's a problem, also, because Pioneer Title Company of Ada County was the original Trustee. Trustees are appointed on a Deed of Trust to be a neutral party and protect the lender and the borrower in the loan.
When you arbitrarily remove a Trustee, who is designed to protect the borrower and the lender, and you appoint a Trustee who is a default loan servicing foreclosure Trustee, solely interested in foreclosing at any cost, and only single agency responsible to the parties seeking to foreclose, it may be considered in a state, according to Attorneys - I just raise the issue - that the fiduciary responsibilities of their original Trustee have been compromised.
And I include those to which I speak in the itemized statement to which you are referring.
Q. Okay. So based on the document, it looks to me like Pioneer Title Company of Ada County was again appointed as Successor Trustee, and the only addition is that there's this care of Executive Trustee Services, LLC.
Is that what you are referring to when you --

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A. Well, yeah.
Q. -- when you talk about potential fiduciary obligations, is the incorporation of this additional entity Executive Trustee Services, that is acting as an Attorney in Fact?
A. Yes. Executive Trustee Services, and many of these services that are hooked in to the outsource-providing networks, like Fidelity, Lender Processing Services, that are under investigation actively by numerous Attorney Generals for fabricating documentation, for issuing documents that robo-signers - people that just sign their name and don't do anything else, there's been many Depositions by many parties - we in Florida created the first nuances of that to our own Attorney General, and it has halted foreclosures all across the Country and resulted in many cases where legal documents are presented to a Court as truthful documents when, in fact, they're fabricated.
I have the opinion, based upon the facts, that your documentation is included in that. Executive Trustee Services is one of those members. And if you look to the graph I made for you on Page 26 of my report, Exhibit 9, you'll see what I'm talking about.

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evidence you have reviewed in preparation for this Deposition, and in the preparation of your report, as to whether there is any evidence of robo-signing in this Notice of Default and Election to Sell Under Deed of Trust?

A. May I take a moment? Let me turn my light, get the heat going, and let me read this for a second.

Yes. I believe Mr. Carlo Magno - Page 2 is attesting to what is written in Page 1; no? Page 2 here is attached to Page 1.

It's the same mistake over here. He's talking about Homecomings; he is not mentioning anything else. He hasn't researched it. It's wrong; it's incorrect.

Q. Well --

A. That's robo-signing.

Q. -- you've got to be clear with me here.

A. That's robo-signing.

Q. Hold on a second, because the reference to Homecomings, as I see it, is actually a reference to - it identifies the Deed of Trust. Is that your answer? I mean, is that --

A. Well, let's see here. It says that MERS, solely as nominee for Homecomings, is taking

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actions.

Q. Well - and - let's run through this real quickly because that's not how I read it. I read the reference to Homecomings as identifying the Deed of Trust - the actual document, itself.

Do you disagree with that?

A. It's identifying the document, itself.

Q. I'm sorry. What did you say?

A. It is identifying the document, but it's saying that there's a breach of the obligation to Homecomings. And I've already testified on numerous different occasions that the Note to Homecomings was paid in full. Homecomings --

Q. Where does it say that there's a breach as to Homecomings?

A. "The Trustee hereby gives notice that a breach of the obligation for which such transfer is security has occurred under the Deed of Trust."

I'm - here's how - maybe this will satisfy your questions. In a case such as this, where so much what I consider to be fabrication has occurred that I've discovered, I have to be suspicious of similar, like this one other piece of documentation, that if you're asking why, in the face of so much what I consider to be misrepresentation, defects and

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deficiencies, would this one particular signer not be suspect to all of the other things that I've exposed here and found here?

And so if you're trying to elicit a statement from me that, lo and behold, this one party is not on the same path as the other things that I've shown, I'd need to see evidence of that.

In the absence of the evidence - and, normally, it would be in the form of an Affidavit or Deposition, and it would include Carlo Magno stating that he has done certain things, and the documentation of which it's referencing, and I shouldn't have to conjecture based upon a lack of full evidence by which I could make an educated, professional opinion, and you're keeping --

Q. Well, you've got to understand, that's what you've been retained to do.

A. Yes. But --

Q. That's - you're an Expert in this case. So I'm asking you to look at this document, and tell me what evidence you see of robo-signing. It's really that simple.

I understand that you think the whole thing was fraudulently done. But I need - I can't deal with totality of the circumstances here. I

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need actual specific statements from you as to the particular documents you think are fraudulent, or robo-signed, or whatever.

That's what we're here for.

MR. STEELE: Just a second here. I think this would be a very good place for us to take a little break because, Mr. McGee, you're arguing with Mr. Kahn. And so I think we ought to take about a five-minute break --

MR. McGEE: I think I need --

MR. STEELE: -- and then, if you have a question, you can ask him that question.

MR. McGEE: -- the pending question --

MR. STEELE: No. You didn't pend a question.

You are arguing. So let's take about a five-minute break, and then we can start up again. We'll go off the record.

(Thereupon, a discussion was held off the record.)

MR. McGEE: Are we ready to go?

MR. STEELE: Are you ready to go, Mr. Kahn?

THE WITNESS: I am. You know, I'd like to say that I don't consider it to be an argument. I

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is, you're not telling the Judge, this was a securitized loan; we sold it to another; here is the chain; this is the way it is; we are related parties; and this is what we did.

So you're obscuring it from the Court.

Q. And just to - just as a reminder, Idaho is a nonjudicial foreclosure State. So, generally, these foreclosures - I mean, there is an option to do foreclosures judicially but, as a general rule, they're done nonjudicially. There is no presentation of issues to the Court.

A. I understand that legitimate, lawful --

Q. So does that change your analysis at all?

A. Well, I understand that legitimate, lawful foreclosures that are done by parties in a manner that we consider to be valid, are done in that manner.

But when there are material misrepresentations of intrinsic and extrinsic form, and questions as to rights and authority, and parties involved who were appearing to fabricate claims and documents, and surreptitious, unidentifiable bald claims, it appears to me that the nonjudicial process, and as has been confirmed by the National Association of Attorney Generals,

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may not be the appropriate venue in which to settle such questionable foreclosures.

Of course, that's a legal matter, but that - does that answer your question?

Q. Well, not really. But - you lost me there, but that's okay.

Why don't we go ahead and turn to Page 12.

A. Okay.

Q. The first line there says, "We find several revealing facts about the MERS assignment of the Deed of Trust that appear not to provide MERS with standing." This statement confused me because I'm not aware of any MERS assignment of the Deed of Trust.

Did you actually find one of those somewhere?

A. No. That appears to be a typo, and should say lack of assignment of Deed of Trust. That's one of the key issues in this case - is that there is no assignment.

Q. Right.

A. That's one of the gross misrepresentation of MERS. Rather than pretend to be in possession of a Note to the bearer at a time when they weren't, and go on the hook and misrepresent themselves in

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the manner that they have, which I don't know whether will be accountable to them or not - and that's not of my interest - it would have been proper, according to the MERS website, and all of the MERS directives, for MERS to issue a proper assignment.

In issuing a proper assignment, then a party can take what actions they have. This has left MERS, in my opinion, hanging in the wind a little bit - a lot. So whether or not it does, that's an infraction, and the consent order that I spoke about dealt with that in terms of MERS has changed its policies since we started this case, and they're addressing these aspects that those Federal agencies desire to hold MERS responsible under.

MR. STEELE: Hello? I'm getting -

MR. McGEE: I'm getting some buzz, too.

THE WITNESS: I started to hear it, but we haven't done anything.

MR. STEELE: And you're cutting out.

THE WITNESS: I think somebody has picked up a phone on your side.

MR. STEELE: I'm getting just buzzing.

MR. McGEE: I'm getting buzzing, myself.

THE WITNESS: I think somebody has picked

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up a phone on your side. We only have one phone.

MR. McGEE: Jon, you're connected through my phone. I mean, I'm on an independent line here.

MR. STEELE: I can hear you fine, Matt.

THE WITNESS: Can you hear me?

MR. STEELE: I can't hear Mr. Kahn at all.

MR. McGEE: I can't, either. Let's go ahead and, if we haven't already, go off the record.

(Thereupon, a discussion was held off the record.)

BY MR. McGEE:

Q. Okay. Back on the record.

Let's continue to look at Page 12. At the very bottom of Page 12, it states, "In this case, we find the loan servicer is seeking to foreclose via their MERS employee, without demonstrating current holder in due course documentation, or providing other authority to do so."

This may be repetitive, but can you just briefly explain what you mean by that?

A. Well, I think you've addressed that with your subsequent submission of documentation that GMAC, with your MERS Milestone, that Homecomings handed off the loan servicing. That wasn't - we didn't have the MERS Milestone.

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Q. Well, I probably got it wrong.
Collateralized Debt?
A. Collateralized Debt Obligations. I'm sorry. I said something else. Collateralized Debt Obligations are like CMOs, Collateralized Mortgage Obligations. They're just basically mortgage bonds, and bonds like the mortgage backed securities.
Q. Well, who is it that these payments were made to by these investors who purchased these cash stream - the cash flow of mortgages?
A. They were made to the issuers through the investment banks. So in Renshaw's case, they were made to Freddie Mac. In many other cases, they would be made to, let's say, the Bear Stearns Asset Backed Security Trust, a Trust formed for the purpose of selling mortgage backed securities.
Q. So you're telling me that, for instance, if a loan of a Note and Deed of Trust were in the amount of $100,000 that gained interest at eight percent, that investors would pay $200,000 in cash for that possibility?
A. Well, if they were buying it at four percent, they would.
Q. If they were buying it at four percent?
A. Yeah. Because $8,000 at eight percent

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would be $100,000. And, you know, the borrower has no credit rating. Now, with the Credit Default Swaps insuring the tranche group of loans, and carrying the Triple A rating, institutional buyers will pay an amount commensurate with a return for triple A, which is much less than eight percent.
If we're in this example using four percent, it would be - they'd paid $200,000. If it was two percent, they'd pay $400,000.
And those are called interest strips. They can strip them off, and then they can sell them in NIMs, Net Interest Margin MBS. They could sell that interest to other parties and make even more money.
Q. You said that's called stripping?
A. Interest strips, yeah. In the old days, it was wraps. An interest strip is where the promoter ad the depositor, or the parties involved, would strip off, say, four percent of interest, or two percent of interest, and only transfer to the trust that lower amount of interest.
They'd retain the other interest to sell to the other parties.
Q. And how could we determine if that happened in Mr. Renshaw's case?

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A. You could get Freddie Mac to divulge which Trust they sold the loan in to, and then get the distribution reports of those Trusts and if, in fact, they did buy this loan, which is questionable at this time - and I could figure that out pretty easily.
Q. Have you been asked to figure that out?
A. I have a service that figures it - that does it, but I haven't been asked in this case because I haven't been provided the confirmation that Freddie Mac even owns this loan.
If Freddie Mac owns this loan, they'll just tell you, you know, what Trust it's in, and they'll be very up front with it. They're not hiding anything that we find these parties having to extract things with forceps, so to speak. You request it, they divulge it, and it's just simple like that. None of this everything being a mystery goes on in that legitimate transactional environment.
Q. Would that be considered public information?
A. Well, it's a public corporation. Freddie Mac will tell you - if you ask the other party to have them produce it, they should just, without

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hesitation, produce that.
Q. And those would be the securitization documents; is that right?
A. Yes. The trust and pool information that Freddie Mac securitized this loan in to if, indeed, that transpired - because, so far, I know that there's been some documents provided to me at the last minute that are supposed to support that.
But as of yet, I haven't really seen anything besides these parties submitting more of their own supporting documents. So that would be nice to see - would be Freddie Mac stepping to the forefront and producing some evidence.
Q. Now, Mr. Kahn, are you familiar with the term, Spa, S-P-A?
A. I am not familiar with that. What does it mean?
Q. Well, I may be wrong, but --
A. You mean, SPV.
Q. SPV. Yeah. What's an SPV?
A. An SPV is a Special Purpose Vehicle that a bankruptcy remote entity - is that what you're talking about?
Q. Well, no. Actually, I was thinking of a servicing agreement between GMAC and, I believe, the

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Attorneys for Mortgage Electronic Registration Systems, Inc.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual,

Plaintiff,

v.

HOMECOMINGS FINANCIAL, LLC, a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware Limited Liability Company; DOES I-V, and ABC CORPORATIONS I-V,

Defendants.

Case No. CV OC 1023898

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

On August 6, 2012, plaintiff Gregory Renshaw ("Renshaw") filed a Motion for Reconsideration ("Motion") of this Court's Decision and Order Re: Summary Judgment (the "Decision and Order") and the Affidavit of Steele in support of the Motion. Renshaw has also filed a Second Affidavit of Steele and Third Affidavit of Steele on August 20, 2012 and September 6, 2012, respectively (the "Steele Affidavits"). Defendant Mortgage Electronic Registration Systems, Inc. ("MERS") files this response in opposition to the Motion.

I. INTRODUCTION

This case arises from Renshaw's default on his home loan. The litigation was initiated approximately twenty one months ago. On March 21, 2012, MERS and all other defendants filed their Motion for Summary Judgment. Renshaw filed his Motion for Partial Summary Judgment on April 11, 2012. Subsequent to the parties respective briefing on the summary judgment motions, defendant Homecomings Financial, LLC and defendant Executive Trustee Services, LLC filed for Chapter 11 bankruptcy relief. By reason of the automatic stay provisions of the Bankruptcy Code, neither defendant was a subject of the summary judgment motions at the time this Court made the findings of fact and conclusions of law described in the Decision and Order.

At the time the cross motions for summary judgment were decided, Renshaw's claims against MERS were reduced to: (1) whether MERS was negligent in the commencement of foreclosure; (2) whether MERS violated the Idaho Consumer Protection Act ("ICPA"); and (3) whether MERS was liable to Renshaw for wrongful foreclosure. In the Decision and Order the Court ruled in favor of MERS and against Renshaw on the cross-motion for summary judgment.

II. RENSHAW'S MOTION

Now, notwithstanding that Renshaw cannot provide any Idaho authority for his Motion, notwithstanding that Renshaw's key evidence relied upon in the Motion has been previously submitted to and reviewed by the Court, and notwithstanding that Renshaw's "new" evidence is either irrelevant, duplicative of previous evidence, or subject to existing objections asserted by MERS, Renshaw asks the Court to reverse its decision.

The Motion is an exercise in futility. Not only are the substantive arguments set forth in the Motion either unfounded or unsupported by the evidence in the record or Renshaw's new evidence, but the Motion is contrary to Idaho law. Accordingly, the

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Motion should be denied and the Court should sign and enter the form of final order and judgment submitted by MERS.

III. RENSHAW'S STATEMENT OF ISSUES

The purported issues of material fact in the Motion are just that; purported issues. All issues posited by Renshaw have either been resolved by the Court, are new issues not previously briefed or presented to the Court, or are moot as a result of a Decision and Order.

First, Idaho authority supports the Court's ruling that MERS is a proper beneficiary and that MERS had the authority to commence the non-judicial foreclosure of Renshaw's property. In addition to the authority cited to the Court in Renshaw and MERS' briefing on the cross-motions for summary judgment, a recent decision in the United States District Court for the District of Idaho further supports the Court's decision as to this issue. *See, Cherian v. Countrywide Home Loans, Inc., et al.*, 2012 WL 2865979, *9 (D. Idaho July 11, 2012). (In accordance with these decisions [Hobson and Trotter], the Court likewise concludes here that MERS had the authority to assign its beneficial interest in the Deed of Trust to U.S. Bank."). If MERS has the authority to assign its interest in a Deed of Trust then MERS is not only a proper beneficiary under Idaho law, but also has the authority to commence a non-judicial foreclosure of Renshaw's property. *See, Cherian,* supra at *9; *Hobson v. Wells Fargo Bank, N.A.*, 2012 WL 505917, *5 (D. Idaho February 15, 2012).

Second, the Court has already dealt with the admissibility and inadmissibility of Renshaw's expert, Richard Kahn, as well as the applicability or inapplicability of such testimony to the issues presented in the summary judgment motions. Renshaw fails to present any argument as to why Kahn's expert report, much less Kahn's supplemental disclosures and deposition excerpts, are admissible, relevant or provide grounds to reverse the Decision and Order.

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Third, while Renshaw may wish he had asserted a claim for an accounting, there is no such claim in the First Amended Complaint.

Next, the issue of securitization is, under Idaho law, a dead end. Whether or not Renshaw is entitled to production of documents relating to securitization and whether or not Renshaw received any such documents, does not help Renshaw establish a material issue of fact. To the extent this Court needs additional relevant authority, the Court in *Cherian* held, after citing other controlling Idaho authority, that securitization of the note does not impact the right to foreclose nor does it discharge the borrower's clear contractual obligation to pay the loan. *Cherian, supra,* at *7, 8.

Finally, there is no open issue or anything to resolve with respect to other pending and perhaps undecided motions. All such motions have been rendered moot by the Decision and Order.

IV. RENSHAW'S NEW EVIDENCE

The new evidence presented by Renshaw does not create a new issue of material fact nor does it create an issue of material fact based on the evidence previously presented to the Court. Other than continuing to argue that the Note has been paid in full under the theories previously presented by Kahn and considered by the Court, Renshaw does not use the new evidence to direct the court to any new issue of material fact justifying reversal of the Decision and Order.

Since Renshaw has not actually directed the Court to the factual issues created or supported by his new evidence, it is difficult for MERS to effectively respond and object to such evidence. Based on the current record and briefing, MERS will attempt to do so but reserves its right to respond further if in his reply Renshaw provides the Court with additional information or direction as to any such issues of material fact.

As to Exhibit 32, MERS previously objected to such evidence in its objection to

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plaintiff's Second Request for Judicial Notice. MERS renews all such objections to what is now known as Exhibit 32.

With respect to Exhibit 34, Renshaw does not refer to or use this exhibit to support any factual or legal argument in the Motion. It is, therefore, immaterial and should be stricken from the record.

MERS previously objected to Exhibits 36 and 37 in its Motion to Strike Expert Disclosure of Richard Merril Kahn. While that motion was filed before Renshaw filed Exhibit 37, the same objections apply to the supplemental disclosures of Kahn in Exhibit 37. In the Third Steele Affidavit, Renshaw submits as Exhibit 45 certain excerpts of the deposition of Kahn. MERS objects to the deposition testimony of Kahn on the issue of securitization on the same grounds as set out in its Motion to Strike.

Exhibits 40, 41, 42 and 44 consist of decisions by U.S. District Court of Oregon, United States Court of Appeals for the Ninth Circuit (as to the same Oregon case), and the State of Washington. None of those decisions are controlling on this Court. There is Idaho authority that is controlling and all such authority has been presented to and relied upon by the Court as it should have been. Accordingly, MERS objects to all such exhibits.

Finally, Renshaw submits as Exhibit 43 the deposition of Ritchie Eppink. Renshaw does not, however, refer to or use Eppink's deposition in any way to support the Motion. It is, therefore, of no use to the Court and should be stricken. In any event, it is apparently immaterial and should be treated as such by the Court.

V. EVIDENCE RELIED UPON BY RENSHAW

Despite submitting voluminous new evidence presumably in support of the Motion, the only evidence Renshaw actually cites in the Motion are Exhibits 16, 32, 42 and 44 (and implicitly 40 and 41), and 45 (and implicitly 36 and 37). A review of that evidence shows that it provides no support for reversing the Decision and Order.

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The key evidence supporting the motion is Exhibit 16 as it is cited repeatedly by Renshaw. That exhibit is represented to be a true and correct copy of excerpts from answers and discovery responses by MERS. The very same evidence was previously submitted by Renshaw as Exhibit 110 in support of Renshaw's Motion for Partial Summary Judgment. MERS objected to Exhibit 110 and rather than restating those objections again, MERS refers the Court to its Motion to Strike Certain Proposed Summary Judgment Evidence dated May 8, 2012 and the Affidavits of Matthew J. McGee dated May 8, 2012. In short, the original evidence presented, Exhibit 110, and the renumbered evidence presented as Exhibit 16, fails to account for MERS' amended and supplemental responses to certain requests for admissions and interrogatories. It is, therefore, fallow ground to create material issues of fact in order to support reversal of the Decision and Order.

As set out above, MERS previously objected to the admissibility and relevance of Exhibit 32, the video deposition of R.K. Arnold. MERS renews all such objections.

With respect to Renshaw's expert Richard Kahn (Exhibit 45 and implicitly Exhibits 36 and 37), MERS has previously filed a Motion to Strike the Expert Disclosure of Kahn and supported that motion with a memorandum and affidavits. MERS sought to strike Kahn's expert report for a number of reasons, not the least of which was that Kahn's report was based on speculation, was not supported by facts or law, and was replete with conclusionary statements. The same objections apply to Kahn's supplemental disclosures and deposition testimony. Both are offered for the same issues as in Kahn's report; that the note was securitized, that the note has in turn been paid in full, and that the "papers" submitted to the Court are false. All of these issues and testimony is without merit and has been previously ruled upon by the Court.

In the Decision and Order, this Court specifically granted MERS' motion to strike the report of Kahn in part and denied it in part. Renshaw does not explain why Kahn's

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deposition testimony or supplemental disclosures, the crux of which was ruled to be inadmissible, is now admissible and creates a material issue of fact. Simply put, Kahn's original expert report failed to create a material issue and the new exhibits are equally unpersuasive. Accordingly, this Court's prior ruling as to Kahn's testimony in terms of what is relevant and admissible as opposed to what is inadmissible stands unchallenged.

With respect to the final exhibits relied upon and actually cited by Renshaw in the Motion, they relate to decisions by Courts in Oregon and Washington which are, of course, not controlling on this Court. Moreover, all such decisions concern issues that are not present in this case and are otherwise factually distinguishable from the claims and issues Renshaw presents to this Court. (Renshaw exhibits 40, 41, 42 and 44.)

VI. ARGUMENT

First, we need to be clear with respect to the record and the claims before the Court. The only claims Renshaw has alleged as to MERS that remain in this case are negligence, wrongful foreclosure and consumer protection act violations. Renshaw has not alleged, nor has he previously briefed, a claim for accounting. Thus, seeking reconsideration and trial of an accounting claim is improper.

Despite the Court's detailed findings of fact and conclusions of law in the Decision and Order, Renshaw persists in his efforts to convince the Court that Renshaw's Note and Deed of Trust have been paid in full. That is yet another exercise in futility. As this Court noted in the Decision and Order, Kahn's unsupported conclusions that somehow the Note was paid are inadequate to meet the requirements of IRCP 56(e) and are merely conclusionary statements without support of specific facts in the record. Moreover, as the Court noted, it could not locate any fact in the record which supports the assertion that the Note and Deed of Trust have been paid in full.

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Simply put, the record that existed at the close of briefing of the cross-motion for summary judgment and the record as it now exists following the Motion provides only unsupported allegations that the Note and Deed of Trust have been paid in full. There is still no fact, nor has Renshaw pointed out any such fact, which supports any such assertion. Instead, the Motion is a rehash of Plaintiff's original briefing and arguments. Having provided the Court with no factual or legal grounds upon which to reconsider and reverse the Decision and Order, the Motion should be summarily denied. Just as the Court was left to ponder following completion of the summary judgment briefing, the Court again is faced with unsupported conclusionary statements with no factual support. Such conclusionary statements did not provide grounds to defeat MERS summary judgment motion and they do not provide grounds to reverse the Decision and Order.

The same defects exist with respect to Renshaw's continued pursuit of the notion that the underlying loan was somehow satisfied because it was securitized. Idaho courts have consistently held that the mere fact that loans are sold in whole or in part, or otherwise subject to subsequent security agreements, does not of itself satisfy the original underlying loan or obligation of the borrower.

VII. CONCLUSION

For all of the reasons above, the Motion should be summarily denied.

DATED this 24th day of September, 2012.

SUSSMAN SHANK LLP

By _____
Michael G. Halligan, ISB No. 6874
Attorneys for Mortgage Electronic Registration Systems, Inc.

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CERTIFICATE OF SERVICE

I certify that on September 24, 2012 I served, **via Electronic Mail and First Class Mail**, a full and correct copy of the foregoing **RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION and AFFIDAVIT OF MICHAEL G. HALLIGAN IN SUPPORT OF DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION**, to the interested parties of record, addressed as follows:

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Dated: September 24, 2012

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual,

Plaintiff,

v.

HOMECOMINGS FINANCIAL, LLC, a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware Limited Liability Company; DOES I-V, and ABC CORPORATIONS I-V,

Defendants.

Case No. CV OC 1023898

AFFIDAVIT OF MICHAEL G. HALLIGAN IN SUPPORT OF DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION

I, Michael G. Halligan, under the penalty of perjury, depose and say as follows:

1. I am one of the attorneys of record for Defendant Mortgage Electronic Registration Systems, Inc. ("MERS") in this action and I have access to my client's files. I make this Affidavit in support of MERS response in opposition to Plaintiff's Motion for Reconsideration. I am over the age of 18 and I make this Affidavit upon personal knowledge and belief.

2. Attached as Exhibit 1 is a true and correct copy of the Memorandum, Decision and Order in *Cherian v. Countrywide Home Loans, Inc., et al*, No. 1:12-CV-0011-BLW, 2012 WL 2865979 (D. Idaho July 11, 2012).

I hereby declare that the statements contained herein are true to the best of my knowledge and belief, and that I understand they are made for use as evidence in court and are subject to penalty for perjury.

DATED this 24th day of September, 2012.

SUSSMAN SHANK LLP

By _____
Michael G. Halligan, ISB No. 6874
Attorneys for Mortgage Electronic Registration Systems, Inc.

STATE OF OREGON)
) ss.
County of Multnomah)

SUBSCRIBED AND SWORN TO before me this 24th day of September, 2012.

OFFICIAL SEAL
KORI L MOREHEAD
NOTARY PUBLIC - OREGON
COMMISSION NO. 456306
MY COMMISSION EXPIRES MAY 06, 2015

_____
Notary Public for Oregon
My Commission Expires: May 6, 2015

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

ALEXANDER CHERIAN,

Plaintiff,

v.

COUNTYWIDE HOME LOANS, INC., NATIONAL TITLE INSURANCE a New York corporation, dba AMERICA'S WHOLESALE LENDER; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; FIDELITY NATIONAL TITLE INSURANCE CO., a California corporation; CITIMORTGAGE, INC., a New York corporation; BAC HOME LOAN SERVICING LP, a Texas limited partnership; US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE HOLDERS OF THE CMLTI 2006-AR5 TRUST FUND, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2006-AR5; RECONTRUST COMPANY, N.A.; NORTHWEST TITLE, LLC DBA NTL LLC a Washington corporation; FIRST AMERICAN TITLE COMPANY, INC., an Idaho Corporation, Bank of America N.A., a Delaware Corporation, and JOHN DOES 1 THROUGH 10,

Defendants.

Case No. 1:12-CV-00110-BLW

MEMORANDUM DECISION AND ORDER

INTRODUCTION

The Court has before it Plaintiff Alexander Cherian's motion for a temporary restraining order and motion to amend his complaint and Defendants'[1] motion to dismiss. For the reasons set forth below, the Court will grant Defendants' motion to dismiss and deny Cherian's motions.

BACKGROUND[2]

Plaintiff Alexander Cherian seeks to enjoin the pending foreclosure sale of a property he owns in Blaine County, Idaho on the grounds that Defendants have failed to comply with Idaho's non-judicial foreclosure statutes.

In April 2006, Cherian obtained a refinance mortgage loan in the amount of $895,000 through Defendant Countrywide Home Loans, Inc. The loan was secured by a Deed of Trust to the residential real property in favor of Countrywide, dba America's

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[1] Defendants who filed the motion to dismiss include: Countrywide Home Loans, Inc. (Countrywide); Mortgage Electronic Registration Systems, Inc. (MERS); Bank of America, N.A., for itself and as successor by merger to BAC Home Loans Servicing LP (Bank of America); ReconTrust Company, N.A. (ReconTrust); and U.S. Bank National Association, as Trustee for the Holders of the CMLTI 2006-AR5 Trust Fund, Mortgage Pass-through Certificates Series 2006-AR5 (US Bank).

[2] The following facts are taken from the Amended Complaint (Dkt. 6-1) and attached exhibits, and documents of public record attached to Defendants' Motion to Dismiss of which the Court takes judicial notice.

Wholesale Lender. The Deed of Trust designated Fidelity National Title Insurance Company as trustee, and Mortgage Electronic Registration Systems, Inc. (MERS) as the beneficiary.

On August 10, 2011, MERS assigned its interest in the Deed of Trust to Defendant U.S. Bank National Association. This assignment was recorded in Blaine County on August 15, 2011, as Instrument No. 589766. Months later, on December 6, 2011, ReconTrust Company, N.A. was appointed successor trustee. The Appointment was recorded on December 19, 2011.

In January 2010, Cherian stopped making his monthly loan payment, defaulting on his loan obligation. Almost two years later, after the loan was transferred to U.S. Bank and ReconTrust was appointed successor trustee, a Notice of Default was recorded on December 16, 2011. At the time the Notice of Default was recorded, Cherian was $127,000 behind on his loan payments. The original Notice of Trustee's Sale, dated December 22, 2011, showed the foreclosure sale was scheduled to take place on April 30, 2012. The Court understands that the foreclosure sale has been delayed.

Now Cherian claims that he does not know who owns the underlying Note and Deed of Trust and contends that none of the Defendants has any "right, estate, title, lien, or interest . . . in or to the Property" *Compl.* ¶14, Dkt. 6-1. Cherian alleges that the following issues somehow deprived Defendants of any valid interest in the property: (1) defects in the execution and transfers of the Note and Deed of Trust and in the recording

of title and assignment documents; (2) the splitting of the Note and Deed of Trust; (3) securitization of the Note; (4) satisfaction of the Note by third parties; and (5) violations of the Idaho Code, the ICPA, the FDCPA, and TILA.

For all these reasons, Cherian asks that the pending foreclosure sale be enjoined. Defendants move to dismiss Cherian's complaint. After Defendants moved to dismiss the complaint, Cherian moved to file a Second Amended Complaint, which Defendants have opposed. Because Cherian's Motion to Amend has not been granted, the Court considers the First Amended Complaint on file unless otherwise noted.

LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While a complaint attacked by a Rule 12(b)(6) motion to dismiss "does not need detailed factual allegations," it must set forth "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555.

In a more recent case, the Supreme Court identified two "working principles" that underlie *Twombly*. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. *Id.* "Rule 8 marks a notable and generous departure

from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Id.* at 1950. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

Under Rule 12(b)(6), the Court may consider matters that are subject to judicial notice. *Mullis v. United States Bank*, 828 F.2d 1385, 1388 (9th Cir. 1987). The Court may take judicial notice "of the records of state agencies and other undisputed matters of public record" without transforming the motions to dismiss into motions for summary judgment. *Disabled Rights Action Comm. v. Las Vegas Events, Inc.,* 375 F.3d 861, 866 (9th Cir. 2004). The Court may also examine documents referred to in the complaint, although not attached thereto, without transforming the motion to dismiss into a motion for summary judgment. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

ANALYSIS

1. Motion to Dismiss

A. Cherian Cannot Quiet Title Without Tendering Payment.

Cherian includes a claim for quiet title in his First Amended Complaint, requesting a declaration that Cherian owns "in fee simple, and is entitled to the quiet and peaceful possession of the Property." *Compl.* at 8, Dkt. 1-6. Cherian, however, has not alleged an

ability or willingness to tender the balance due on the loan. This omission is fatal to Cherian's quiet title claim. *Hobson v. Wells Fargo Bank, N.A.*, Case No. 1:11–cv–00196–BLW, 2012 WL 505917, *3 (D.Idaho February 15, 2012) (quoting *Trusty v. Ray,* 249 P.2d 814, 817 (Idaho 1952)). "A mortgagor cannot without paying his debt quiet title as against the mortgagee." *Trusty*, 249 P.2d at 817 (internal quotation marks and citation omitted).

Cherian's allegations that US Bank has failed to follow the applicable nonjudicial foreclosure statutes does not excuse his lack of tender or otherwise save his quiet title claim. Even assuming Cherian proves that US Bank did not comply with Idaho's nonjudicial foreclosure statutes, he cannot quiet title in the property because of a defect in the foreclosure process. "This Court is not in a position to award plaintiffs a windfall." *Kham v. Executive Trustee Services, LLC*, No. CV F 12–0321 LJO BAM, 2012 WL 967864, *15 (E.D.Cal. March 21, 2012).

B. Cherian Does not Allege Any Facts to Support his Claim that Defendants' Failed to Comply with Idaho's Foreclosure Statutes.

First, Cherian alleges Defendants do not have an interest in the property allowing them to foreclose for the following reasons: "lack of proper recording of required documents of title", "defects in the execution [and transfer] of the notes and deeds of trust", "violation of the law rendering the documents void", "satisfaction of the notes by third parties or entities, by federal relief, by tax credits, or otherwise", and "other such defects as may be revealed during discovery." *Compl.* ¶¶ 24(a), (c)-(d), (f)-(h). Cherian,

however, asserts not one fact to support these claims. These purely conclusory and speculative allegations do not state a claim for violation of Idaho's foreclosure statutes, or otherwise suggest that the initiation of foreclosure proceedings against Cherian was improper.

C. Securitization of the Note Does Not Impact the Right to Foreclose.

Cherian alludes to several theories to suggest that securitization of the loan impacts Defendants' interest in the property or otherwise affects their right to foreclose. "This is not a new battlefield. Several courts have rejected various theories that securitization of a loan somehow diminishes the underlying power of sale that can be exercised upon a trustor's breach." *Washburn v. Bank of America, N.A.*, Case No. 1:11–cv–00193–EJL–CWD, 2011 WL 7053617, *4-5 (D. Idaho October 21, 2011) (internal quotation marks omitted) (citing cases). And nothing in Cherian's complaint or brief opposing the motion to dismiss persuades this Court to deviate from these decisions.

In his brief, Cherian argues, "Securitization is relevant if Defendant U.S. Bank N.A. as trustee for a pool of securities, one of which was Plaintiff's, and that Trust no longer exists, then how can they proceed as if it did? They may be trying to collect for a second time." *Pl's Resp.* at 8, Dkt. 25. Cherian's ruminations do not convince the Court that securitization of the loan somehow impacts the right to foreclose. Cherian alleges no facts suggesting that U.S. Bank has already collected once. And Cherian certainly does not allege that U.S. Bank is attempting to collect from Cherian a second time. Nor does

Cherian allege that he has received any competing or duplicative requests for payment. Rather, all the evidence shows that Cherian is over $100,000 behind on his loan payments. He defaulted on his loan obligation and the documents he signed in connection with obtaining the loan state that the property may be sold in a non-judicial foreclosure sale under these circumstances. Securitization of the loan does not discharge Cherian's clear contractual obligation to repay the loan.

D. Proof of Note Ownership Does Not Bear on Defendants' Right to Foreclose.

Cherian suggests that Defendants must produce the note to prove their right to foreclose. But the Idaho Supreme Court rejected this argument in *Trotter v. Bank of New York Mellon*: "a trustee may initiate nonjudicial foreclosure proceedings on a deed of trust without first proving ownership of the underlying note...." 275 P.3d 857 (Idaho 2012). This Court, in conformance with the Idaho Supreme Court's interpretation of Idaho law, likewise rejects Cherian's argument that his lack of knowledge regarding which Defendant owns the note somehow affects the right to foreclose. The Court will therefore dismiss this claim.

E. The Alleged Splitting of the Note and Trust Deed Did Not Extinguish the Right to Foreclose.

Cherian alleges that none of the Defendants "have any valid claim to or interest in" the property due to "split of ownership of the notes and deeds of trust." *Compl.* ¶ 24(b), Dkt. 6-1. In *Cervantes v. Countrywide Home Loans, Inc.*, the Ninth Circuit, explaining that MERS is an electronic database that tracks the transfers of the beneficial

interest in home loans, held that use of the MERS system does not eliminate a party's right to foreclose – even accepting the premise that use of MERS splits the note from the deed. 656 F.3d 1034 (9th Cir. 2011). Applying Ninth Circuit law, this Court finds that any alleged splitting of the note from the deed does not preclude the proper Defendant in this case, or any other proper party, from foreclosing on Cherian's Deed of Trust.

F. MERS Is a Proper Beneficiary.

Cherian also argues that MERS did not have the authority under Idaho law, either "by right" or "by agency," to transfer the beneficial interest in the Deed of Trust to U.S. Bank. This position has been routinely rejected by the courts, including this Court. *See, e.g., Hobson v. Wells Fargo Bank, N.A.,* 2012 WL 505917, *5 (D.Idaho February 15, 2012). In *Hobson*, relying in part on the Idaho Supreme Court decision in *Trotter*, this Court concluded that MERS had the authority to assign its beneficial interest in the deed of trust to the foreclosing bank. *Id.* By contrast, Cherian has failed to cite any controlling authority supporting his position that MERS is a sham beneficiary. Nor has Cherian alleged any facts distinguishing this case from *Hobson* or *Trotter.* In accordance with these decisions, the Court likewise concludes here that MERS had the authority to assign its beneficial interest in the Deed of Trust to U.S. Bank.

G. Defendants Are Not Debt Collectors Under the FDCPA.

Congress enacted the Fair Debt Collection Practices Act (FDCPA) "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively

disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C.A. § 1692. But the "activity of foreclosing on [a] property pursuant to a deed of trust is not the collection of a debt within the meaning of the" FDCPA. *Hulse v. Ocwen Fed. Bank, FSB,* 195 F.Supp.2d 1188, 1204 (D.Or. 2002). And lenders and mortgage companies are not "debt collectors" within the meaning of the FDCPA. *Ines v. Countrywide Home Loans, Inc.*, Case No. 08cv1267 WQH (NLS), 2008 WL 2795875, *3 (S.D.Cal. July 18, 2008) (citing *Williams v. Countrywide,* 504 F.Supp.2d 176, 190 (S.D.Tex.2007) ("Mortgage companies collecting debts are not 'debt collectors.'").

In this case, Cherian does not allege any facts in support of his allegations that any Defendant qualifies as a "debt collector," or that any Defendant engaged in "debt collection activity." This would not change even if the Court were to consider Cherian's proposed Second Amended Complaint, in which he makes only the conclusory allegation that Defendants are debt collectors – and nothing more. Countrywide is the lender, U.S. Bank is the lender's successor, and Bank of America is the loan servicer – none of which qualify as "debt collectors" under the FDCPA. *Caballero v. Ocwen Loan Serv.*, Case No. C–09–01021 RMW, 2009 WL 1528128, at *1 (N.D.Cal. May 29, 2009). In addition, MERS' role as the beneficiary of the Deed of Trust was established at the loan's origination prior to Cherian's default, and therefore it is also exempt under the FDCPA. *Fitzgerald v. PNCBank*, Case No. 1:10–CV–452–BLW, 2011 WL 1542138, *3 (D. Idaho

April 21, 2011). Finally, ReconTrust, as the successor trustee, has no ownership interest in the Note and no claim can be stated against it under the FDCPA. Accordingly, any claim Cherian asserts based on the FDCPA is dismissed.

H. Cherian Fails to Allege a Violation of the ICPA or the Idaho Code.

In his Amended Complaint, Cherian alleges that Defendants violated the ICPA, as well as other unnamed sections of the Idaho Code, but he does not explain how. Without facts to support this conclusory allegation, any claim asserting a violation of ICPA must be dismissed. *Twombly*, 550 U.S. at 555.

The allegations contained in Cherian's Proposed Second Amended Complaint do not change this conclusion. In his Second Amended Complaint, Cherian alleges that Defendants violated the Idaho Consumer Protection Act "by knowing [sic] proceeding with non-judicial foreclosure on Plaintiffs [sic] real property whose being aware of MERS actions and lack of proper recording, or all transfers of beneficial interests." However, as discussed above, MERS took no actions not approved by other courts or that otherwise harmed Cherian. And Cherian fails to allege any facts to support his contention that Defendants did not meet the requirements of Idaho's foreclosure laws. So he has not stated a claim under the ICPA or any other provision of the Idaho Code.

I. Cherian Fails to Allege a Violation of the Truth In Lending Act.

Cherian maintains that U.S. Bank violated the Truth in Lending Act "by failing to notify the borrower, Mr. Cherian, in writing within 30 days after the date on which the mortgage loan was sold or otherwise transferred or assigned by Defendant MERS."

Compl. ¶ 16. TILA requires that an assignee of a loan notify the borrower in writing within 30 days of the transfer. 15 U.S.C. § 1641(g)(1). Nonetheless, Cherian fails to state a valid claim under Section 1641(g)(1).

While Cherian alleges U.S. Bank violated TILA, he does not allege U.S. Bank's failure to provide notice caused him to incur actual damages. A creditor that fails to comply with any requirement imposed under § 1641(g)(1) only faces liability for "any *actual damage* sustained by such person as a result of the failure." *See* 15 U.S.C. § 1640(a)(1) (discussing civil liability) (emphasis added). Moreover, "in the case of an individual action," damages are limited to "twice the amount of any finance charge in connection with the transaction" and, in cases involving real property, "not less than $400 or greater than $4,000." *Id.* § 1640(a)(2)(A)(i), (iv). Cherian has not alleged any actual damages or finance charges related to U.S. Bank's failure to provide the notice of assignment required under § 1641(g)(1), and therefore this claim must be dismissed.

2. Motion to Amend

Cherian has moved to file a Second Amended Complaint. Even if a party has not requested leave to amend, a dismissal without leave to amend is improper unless it is beyond doubt that the complaint "could not be saved by any amendment." *Harris v.*

Amgen, Inc., 573 F.3d 728, 737 (9th Cir. 2009)(issued 2 months after *Iqbal*).[1] Having reviewed Cherian's proposed Second Amended Complaint, this Court finds proposed amendment would be futile.

In his proposed Second Amended Complaint, Cherian offers no new facts that cure the current Complaint's deficiencies. Cherian adds an additional paragraph challenging MERS' authority to assign the Note and Deed of Trust to U.S. Bank, but such challenges to MERS have been almost uniformly rejected by the courts, including this Court. Cherian's proposed amendments do not change that fact.

Cherian also adds a paragraph alleging that Defendants failed to record the assignment to Citimortgage. Even assuming that this fact would support Cherian's claim that any pending foreclosure would be improper, it is not correct. Citimortgage is the current owner of the loan and U.S. Bank is Trustee for Citimortgage. The assignment of the Deed of Trust to U.S. Bank as Trustee for Citimortgage was recorded on August 15, 2011. Nor does Second Amended Complaint add any facts suggesting that any other Defendant failed to comply with Idaho's foreclosure statutes.

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[1] The Court has some concern about the continued vitality of the liberal amendment policy adopted in *Harris v. Amgen*, based as it is on language in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), suggesting that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim. . .." Given *Twombly* and *Iqbal*'s rejection of the liberal pleading standards adopted by *Conley,* it is uncertain whether the language in *Harris v. Amgen* has much of a life expectancy.

Finally, Cherian adds allegations relating to his FDCPA claim. But as already discussed above, those allegations would not save those claims either. Cherian's conclusory allegation that Bank of America and ReconTrust are debt collectors under the FDCPA is insufficient to cure the deficiencies in the First Amended Complaint.

For those reason set forth above, the Court will deny Cherian's Motion to Amend. Because the Court finds that Cherian has failed to state a claim and that amendment of the First Amended Complaint would be futile, the Court finds that Cherian's Motion for a TRO is moot.

ORDER

IT IS ORDERED that:

1. Defendants' Motion to Dismiss (Dkt. 13) is GRANTED.
2. Defendants' Motion for Judicial Notice (Dkt. 13-2) is GRANTED.
3. Plaintiff's Motion to Amend (Dkt. 22) is DENIED.
4. Plaintiff's Amended Motion for Temporary Restraining Order (Dkt. 3) is MOOT.

DATED: July 11, 2012

B. Lynn Winmill
Chief Judge
United States District Court

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual, Plaintiff, vs. HOMECOMINGS FINANCIAL, LLC, a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware Limited Liability Company; DOES I-V, and ABC CORPORATIONS I-V, Defendants.	CASE NO. CV OC 1023898 **REPLY TO RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION**

Plaintiff Gregory Renshaw files this Reply to MERS' *Response in Opposition to Plaintiff's Motion for Reconsideration.* After years of deceit, bullying, misleading, and hornswoggling homeowners, their lawyers and our court system, MERS claims are crumbling.

MERS CANNOT BE A BENEFICIARY IN OREGON

On July 18, 2012 the Oregon Court of Appeals struck down Mortgage Electronic Registration Systems, Inc.'s claim that it qualified as a "beneficiary" under Oregon law, the same claim it makes in this matter. MERS is now represented by the law firm that made this claim in the Oregon Court of Appeals.

The Oregon Trust Deed Act requires (as does the Idaho Trust Deed Act) that the party receiving loan payments must publicly record all changes in mortgage ownership before starting a non-judicial foreclosure. "A beneficiary that uses MERS to avoid publicly recording assignments of a trust deed cannot avail itself of a non-judicial foreclosure process that requires that very thing – publicly recorded assignment." *See, Niday v. GMAC Mortgage LLC* at p. 28, copy attached.

MERS is not a legally recognized beneficiary in either Oregon or Washington; neither can it be a legally recognized beneficiary in Idaho.

NO ASSIGNMENT OF RENSHAW'S DEED OF TRUST HAS BEEN RECORDED

The Idaho Trust Deed Act requires (as does the Oregon Trust Deed Act) that all assignments be recorded prior to initiating non-judicial foreclosure. Although Renshaw's loan has been assigned and/or transferred many, many (perhaps even dozens) of times, these assignments and/or transfers have never been recorded.

RENSHAW IS ENTITLED TO AN ACCOUNTING

Renshaw's Deed of Trust (at Section 2. Application of Payments or Proceeds) states that "...all payments accepted and applied by Lender...." shall be applied first to interest and then to principal. Renshaw is entitled to an accounting that would prove to this Court that his obligation

to the original Lender and all assignees or transferees have been paid in full.

CONCLUSION

Renshaw respectfully requests this Court reconsider its Decision And Order Re: Summary Judgment dated July 23, 2012, and schedule this case for jury trial.

DATED this 1st day of October 2012.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of October 2012, a true and correct copy of the foregoing **REPLY TO RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION** was served upon opposing counsel as follows:

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RUNFT & STEELE LAW OFFICES, PLLC

By: /s/ Jon M. Steele
JON M. STEELE
Attorney for Plaintiff

FILED: July 18, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

REBECCA NIDAY,
fka Rebecca Lewis,
Plaintiff-Appellant,

v.

GMAC MORTGAGE, LLC,
a foreign limited liability company;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
a Delaware corporation;
and EXECUTIVE TRUSTEE SERVICES, INC.,
a California corporation,
Defendants-Respondents.

Clackamas County Circuit Court
CV10020001

A147430

Henry C. Breithaupt, Judge pro tempore.

Argued and submitted on January 17, 2012.

W. Jeffrey Barnes argued the cause for appellant. With him on the briefs were Elizabeth Lemoine and Luby Law Firm.

Robert J. Pratte argued the cause for respondents. With him on the brief were William G. Fig and Sussman Shank LLP.

David L. Koen and Legal Aid Services of Oregon filed the brief *amicus curiae* for Oregon Trial Lawyers Association.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

NAKAMOTO, J.

Reversed and remanded.

NAKAMOTO, J.

This case, one of first impression in the Oregon appellate courts, involves the intersection between Oregon's nonjudicial foreclosure laws and a creature of more modern vintage: Mortgage Electronic Registration Systems, Inc., also known as MERS. Since 1959, the Oregon Trust Deed Act has authorized the use of trust deeds as security for home loans and allowed foreclosure of a defaulting homeowner's interest by means of a privately-conducted, advertised trustee's sale of the home rather than pursuant to a court-ordered, judicial foreclosure--provided, however, that certain statutory requirements are met. One of those requirements is that "any assignments of the trust deed by the trustee or the beneficiary" must be "recorded in the mortgage records in the counties in which the property described in the deed is situated." ORS 86.735(1).

MERS, meanwhile, was created by the mortgage industry in the early 1990s to make it easier to bundle and sell promissory notes and their related security interests on the secondary market. MERS is not itself a lender. Rather, lenders, loan servicers, investors, and other industry participants can become members of MERS. When a MERS member originates a home loan, MERS--as opposed to the lender--is named as the "beneficiary" of the trust deed that the home buyer provides as security for the home loan. MERS then allows members to transfer and track their beneficial interests in those promissory notes and associated trust deeds through a private, internal database rather than by publicly recording each assignment in county mortgage records.

The question before us--and one that homeowners and MERS are litigating

throughout the country under similar state laws[1]--is whether MERS and its members can avail themselves of Oregon's statutory, nonjudicial foreclosure process for trust deeds. Plaintiff is a homeowner who, like many other borrowers, executed a trust deed that named MERS as the "beneficiary." After plaintiff defaulted on her loan repayment obligation, she received a notice of trustee's sale that identified MERS as the "beneficiary" of the sale and that asserted a power of sale under the trust deed. Plaintiff then filed this declaratory judgment and injunctive relief action to stop the trustee's sale, arguing that, notwithstanding the labels used in the trust deed, MERS is not the "beneficiary" of the trust deed for purposes of Oregon's nonjudicial foreclosure laws.

The trial court granted summary judgment in favor of MERS and the other defendants (the loan servicer and the trustee), ruling that MERS was the designated "beneficiary" of the trust deed and that each statutory requirement for nonjudicial foreclosure had been met--including the requirement that any assignments of the trust

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[1] A majority of states have enacted statutes permitting nonjudicial foreclosures. *See, e.g.*, Ala Code §§ 35-10-11 to 35-10-16; Alaska Stat §§ 34.20.070 - 34.20.135; Ariz Rev Stat Ann §§ 33-807 - 33-821; Ark Code Ann §§ 18-50-101 - 18-50-117; Cal Civ Code §§ 2924 - 2924k; Ga Code Ann §§ 44-14-160 - 44-14-162.4; Haw Rev Stat §§ 667-5 - 667-10; Idaho Code Ann §§ 45-1502 - 45-1515; Me Rev Stat Ann tit 14 §§ 6203-A – 6209; Mich Comp Laws §§ 600.3201 - 600.3280; Minn Stat Ann §§ 580.01 - 580.30; Miss Code Ann §§ 89-1-53 - 89-1-63; Mo Rev Stat §§ 443.290 - 443.410; Neb Rev Stat §§ 76-1001 - 76-1018; Nev Rev Stat Ann §§ 107.030 - 107.100; NH Rev Stat Ann §§ 479:22 - 479:27; NC Gen Stat §§ 45-21.1 - 45-21.33; Okla Stat Ann tit 46, §§ 40-49; ORS 86.705 - 86.795; RI Gen Laws §§ 34-11-22, 34-27-1 - 5; SD Codified Laws §§ 21-48-1 – 15; Tenn Code Ann §§ 35-5-101 - 35-5-117; Tex Prop Code Ann §§ 51.002 - 51.005; Utah Code Ann §§ 57-1-19 - 57-1-36; Va Code Ann §§ 55-59 - 55-66.7; Wash Rev Code Ann §§ 61.24.005 - 61.24.130; W Va Code Ann §§ 38-1-1 - 38-1-15; Wyo Stat Ann §§ 34-4-101 - 34-4-113.

deed must be recorded in the county mortgage records, ORS 86.735(1). Plaintiff now appeals, again arguing that the "Oregon legislature intended the 'beneficiary' to be the one for whose benefit the [deed of trust] is given, which is the party who lent the money," rather than MERS. We agree and hold that the "beneficiary" of a trust deed under the Oregon Trust Deed Act is the person designated in that trust deed as the person to whom the underlying loan repayment obligation is owed. The trust deed in this case designates the lender, GreenPoint Mortgage Funding, Inc., as the party to whom the secured obligation is owed. And, because there is evidence that GreenPoint assigned its beneficial interest in the trust deed but did not record that assignment, the trial court erred in granting summary judgment in favor of defendants.

I. BACKGROUND

Because the facts giving rise to this dispute are best understood in their broader context, we begin with a brief overview of Oregon's nonjudicial foreclosure laws, recording statutes, and the nature of MERS. We then focus on plaintiff's trust deed, the facts surrounding the trustee's notice of the sale of plaintiff's home, and the trial court proceedings.

A. *Real Estate Financing in Oregon*

For the first hundred years of statehood, real estate loans in Oregon were typically secured by mortgages. *See, e.g., Sellwood v. Gray & DeLashmutt*, 11 Or 534, 5 P 196 (1884) (describing various principles of mortgage law). By statute, Oregon law provided (and still provides) that "[a] mortgage of real property is not a conveyance so as to enable the owner of the mortgage to recover possession of the property without a

foreclosure and sale." ORS 86.010. Rather, a mortgage creates a lien on the property that can be foreclosed, like other liens, only by way of judicial action, after a lawsuit has been filed. *See* ORS 88.010. And, as is the case with other liens, the judicial foreclosure process includes a statutory right to redemption. That is, once a court issues a decree of foreclosure in favor of the mortgagee, thereby ordering the mortgaged property to be sold, the mortgagor nonetheless retains the right to satisfy the debt and redeem the property for a period of time after the sale. ORS 88.080; ORS 88.100; ORS 23.410 - 23.600 (1957).

By the late 1950s, there was a movement afoot to streamline certain features of Oregon's mortgage laws--particularly, judicial involvement and the statutory right to redemption by borrowers and junior lienholders. *See* Minutes, Senate Judiciary Committee, SB 172, Feb 19, 1957. In 1959, the legislature responded by enacting what is known as the Oregon Trust Deed Act (OTDA), ORS 86.705 to 86.795, as an alternative to the judicial foreclosure process.[2] The OTDA authorizes the use of "[t]ransfers in trust of an interest in real property"--*i.e.*, transfers by trust deeds, "to secure the performance of an obligation of a grantor, or any other person named in the deed, to a beneficiary." ORS 86.710; *see also* ORS 86.705(5) (defining a "trust deed" as a deed executed in conformity with the OTDA that conveys "an interest in real property to a trustee in trust to secure the performance of an obligation owed by the grantor or other person named in

[2] For purposes of the issues raised in this case, there were no material changes to the OTDA between the time plaintiff executed the trust deed in 2006 and filed this action in early 2010. Unless otherwise noted, statutory references in this opinion are to the 2009 versions.

the deed to a beneficiary").[3]

Under the OTDA, a trust deed is "deemed to be a mortgage on real property" and is generally "subject to all laws relating to mortgages on real property"--except where particular differences are spelled out in the OTDA. ORS 86.715. The most significant difference, of course, is that the trustee may "foreclose a trust deed by advertisement or sale" without judicial involvement.[4] Under ORS 86.735, four requirements must be satisfied in order for the trustee to initiate a nonjudicial foreclosure:

> "(1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in the mortgage records in the counties in which the property described in the deed is situated; and
>
> "(2) There is a default by the grantor or other person owing an obligation, the performance of which is secured by the trust deed, or by their successors in interest with respect to any provision in the deed which authorizes sale in the event of default of such provision; and
>
> "(3) The trustee or beneficiary has filed for record in the county clerk's office in each county where the trust property, or some part of it, is situated, a notice of default containing the information required by ORS 86.745 and containing the trustee's or beneficiary's election to sell the property to satisfy the obligation; and

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[3] Although deeds of trust predated the OTDA, Oregon law had long treated deeds of trust, when used as security for a real estate purchase, as if they were mortgages. *See* Lord's Oregon Laws, title XLVII, ch III, § 7237 (1910) ("A trust deed in the nature of a mortgage shall be deemed to be a mortgage, and be subject to the same rules as a mortgage.").

[4] The nonjudicial foreclosure process is elective. The beneficiary of the trust deed also has the option of foreclosing "as provided by law for the foreclosure of mortgages on real property," ORS 86.710, or suing on the promissory note, *see Beckhuson v. Frank*, 97 Or App 347, 351, 775 P2d 923, *rev den*, 308 Or 465 (1989).

"(4) No action has been instituted to recover the debt or any part of it then remaining secured by the trust deed, or, if such action has been instituted, the action has been dismissed, [with limited exceptions]."

If each of those requirements is met, the trustee can then provide the grantor and others with notice of the intended sale; that notice likewise must meet various statutory criteria. *E.g.*, ORS 86.737 (describing the form of the notice); ORS 86.740 (listing persons to whom notice of sale must be given); ORS 86.745 (contents of the notice); ORS 86.750 (service and publication requirements of notice of sale). If the trustee provides the required notice of the sale to the proper parties, and otherwise conducts the sale according to the statutory requirements, the trust deed grantor--unlike a traditional mortgagor--has no statutory right to redeem the property after the trustee's sale. *See* ORS 86.770 (describing effect of a trustee's sale).

B. *Oregon's Recording Laws*

Operating in the background of the OTDA are Oregon's recording laws. *See, e.g.*, ORS 86.735(1) (requiring trust deeds, assignments of trust deeds, and appointments of successor trustees to be recorded in appropriate county mortgage records). Like every other state, Oregon has enacted recording statutes that govern priorities with respect to interests in real property. Those statutes generally serve two related purposes: They protect *bona fide* purchasers who acquire interests in real property for consideration and without notice of prior interests. *E.g.*, ORS 93.640 ("Every conveyance, deed, land sale contract, assignment of all or any portion of a seller's or purchaser's interest in a land sale contract or other agreement or memorandum thereof affecting the title of real property within this state [including mortgages and trust deeds]

which is not recorded as provided by law is void as against any subsequent purchaser in good faith and for a valuable consideration of the same real property * * *."). Conversely, they allow *prospective* purchasers to consult the public records and discover prior claims that might affect their interests, and they protect recorders by putting prospective purchasers on notice of those prior claims. ORS 93.710(1).

Oregon's recording laws require the county clerk to keep a separate book and index for recorded mortgages. ORS 93.610; ORS 93.630. And, as later discussed in more detail, there are also specific recording requirements for discharging a mortgage. *See, e.g.*, ORS 86.100 - 86.140. If the mortgage is discharged in accordance with those recording requirements, "the land described in the mortgage [is free] from the lien of the mortgage as against all subsequent purchasers and incumbrances for value and without notice." ORS 86.120.

Since at least the late 1800s, Oregon law has also expressly permitted the recording of *assignments* of mortgages. *See* ORS 86.060 ("Mortgages may be assigned by an instrument in writing, executed and acknowledged with the same formality as required in deeds and mortgages of real property, and recorded in the records of mortgages of the county where the land is situated."); ORS 205.130(2)(a) (county clerk shall record all "[d]eeds and mortgages of real property, powers of attorney and contracts affecting the title to real property, authorized by law to be recorded, assignments thereof and of any interest therein when properly acknowledged or proved and other interests affecting the title to real property required or permitted by law to be recorded"); *see generally Barringer v. Loder*, 47 Or 223, 81 P 778 (1905) (explaining history of statutes

regarding recording of mortgage assignments).[5] Recording an assignment of a mortgage is not (and never has been) necessary under Oregon law to transfer a beneficial interest in the security instrument. Rather, by recording the assignment, the assignee gains a measure of protection against subsequent purchasers who are not otherwise aware of the assignment. *See Willamette Col. & Credit Serv. v. Gray*, 157 Or 77, 83, 70 P2d 39 (1937) ("It may be conceded that respondent was not obliged to take a written assignment and record it in order to acquire title as between the immediate parties, *but we think it was required to do so in order to maintain its lien as against an innocent purchaser*." (Emphasis added.)).[6] The recorded assignment also protects the assignee in the event that the original mortgagor and mortgagee enter into a purported discharge of the mortgage after the assignment. *See* ORS 86.110; ORS 86.120.

Those recording laws for mortgages were in place in 1959 when the legislature enacted the OTDA and, as later discussed in more detail, generally apply

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[5] Until 1965, Oregon law stated that "[e]very assignment of mortgage shall be recorded at full length, and a reference shall be made to the book and page containing such assignment upon the margin of record of the mortgage." *Former* ORS 86.070 (1959), *repealed by* Or Laws 1965, ch 252, § 1. The legislature repealed that provision to reduce the cost of recording for counties that had begun using microfilm but were required to print copies in order to make margin notations. Minutes, Senate Committee on Local Government, HB 1400, Apr 9, 1965.

[6] Other sources of law, such as Uniform Commercial Codes Articles 3 and 9, also govern priority with regard to certain assignments of security interests in real property. *See* ORS 79.0109; UCC § 9-109, Official Comment 7 ("[I]f M sells the promissory note to X or gives a security interest in the note to secure M's own obligation to X, this Article applies to the security interest thereby created in favor of X. The security interest in the promissory note is covered by this Article even though the note is secured by a real-property mortgage.").

equally to the recording of trust deeds. ORS 86.715. For now, suffice it to say that the trustee may foreclose a trust deed under the OTDA if certain public recording requirements are satisfied--namely, that "[t]he trust deed, any assignments of the trust deed by the trustee or the beneficiary * * * are recorded in the mortgage records in the counties in which the property described in the deed is situated." ORS 86.735(1).

C. *MERS*

In the first few decades after the OTDA was enacted, real estate loans in Oregon fit neatly into its scheme: A lender originated a home loan; as security for the loan, a borrower executed a trust deed that named the lender as the beneficiary; and assignments of the trust deed from the lender-beneficiary, if any, were recorded in the mortgage records of the county in which the home was located. That changed, however, with the growth of the market for mortgage-backed securities and the consequent development of MERS.[7]

By the early 1990s, lenders were commonly bundling beneficial interests in individual loan obligations and selling them in a secondary market as mortgage-backed securities. Depending on how the loans were originated and sold, and depending on the applicable state laws where the loans were made, it was sometimes necessary for assignments of mortgage interests to be recorded under state recording acts. *See* Phyllis

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[7] For purposes of providing background on MERS, we have not confined ourselves to the record in this case, drawing instead on law review articles, case law, and other sources that describe the role of MERS in real estate financing. The parties, although disagreeing about the merits of MERS, do not disagree fundamentally about what MERS is and does.

K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 Idaho L Rev 805, 808 (1995) ("[T]he difficulty involved in national investors' staying abreast of state law has resulted in secondary market investors generally requiring recorded assignments for most transfers of prior ownership interests and servicing rights. Warehouse lenders require delivery of a note and an executed but unrecorded assignment of mortgage to perfect their security interest in mortgages."). The public recording of numerous bundled mortgage and trust deed assignments was both cumbersome and expensive for buyers and sellers of mortgage-backed securities. *Id.*

In 1993, various mortgage industry participants proposed the MERS system as an expedient alternative to recording multiple transfers of beneficial interests in loan obligations in the county records. Under that system, companies that participate in the mortgage industry, such as lenders and servicing institutions, can become members of MERS and pay a fee to use the MERS system, a private electronic database that tracks the transfer of beneficial interests in loan obligations.

When a MERS member originates a home loan, the loan is assigned an 18-digit "Mortgage Identification Number" in the MERS database. If, as is often the case, the loan obligation is secured by a trust deed, MERS is designated in that trust deed as the "nominee" for the member and for the member's successors and assigns. MERS is also named as the "beneficiary" of the trust deed. If the MERS member sells or assigns the beneficial interest in the loan obligation to another member, that transfer is tracked in the MERS database (by the loan's Mortgage Identification Number). The transfer is not recorded in the county records, and MERS continues to act as "beneficiary" of the trust

deed.

D. *Plaintiff's Trust Deed, Default, and Trustee's Notice of Sale*

In August 2006, plaintiff entered into a home loan agreement with GreenPoint, a MERS member. In exchange for the loan, plaintiff signed a promissory note in which she promised to pay $236,000, plus interest, to GreenPoint. Plaintiff also executed a "Deed of Trust," which was subsequently recorded in Clackamas County. The trust deed states that "Mortgage Electronic Registration Systems, Inc. (MERS) is the Grantee of this Security Instrument," and it includes various "definitions":

> "(C) 'Lender' is GreenPoint Mortgage Funding, Inc. * * *
>
> "(D) 'Trustee' is FIRST AMERICAN TITLE INSURANCE COMP
>
> "(E) 'MERS' is Mortgage Electronic Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. *MERS is the beneficiary under this Security Instrument.* * * *
>
> "(F) 'Note' means the promissory note signed by Borrower and dated August 15, 2006. The Note states that borrower owes Lender [$236,000] plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than September 1, 2036."

(Uppercase in original; emphasis added.) The trust deed also provides:

> "TRANSFER OF RIGHTS IN THE PROPERTY
>
> "*The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS.* This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note, and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the [Clackamas County].

"* * * * *

"TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the 'Property.' *Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property, and to take any action required of Lender, including, but not limited to, releasing and canceling this Security Instrument.*"

(Uppercase in original; emphasis added.)

On April 17, 2009, MERS recorded a document appointing a successor trustee, LSI Title Company of Oregon, LLC. Sometime after that date, plaintiff received a "Trustee's Notice of Sale" from Defendant Executive Trustee Services, Inc., agent for LSI Title Company. That notice of sale identified "'MERS' MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., SOLELY AS NOMINEE FOR LENDER GREENPOINT MORTGAGE FUNDING, INC., as Beneficiary[.]" (Uppercase in original.) It further stated that plaintiff was in default and that "[b]oth the beneficiary and trustee have elected to sell the said real property to satisfy the obligations secured by said trust deed and notice has been recorded pursuant to [ORS] 86.735(3) * * *." The sale was scheduled for September 2, 2009.

Plaintiff, upon receiving the notice of trustee's sale, sent a letter, by way of her attorney, to Executive Trustee Services. In the letter, plaintiff demanded that the sale be canceled and requested that Executive Trustee Services provide various documents,

including documents establishing the "entire chain of title to the Deed of Trust and note." Plaintiff contends that she never heard back from Executive Trustee Services in response to that letter or her follow-up letter, but the trustee's sale was apparently canceled and rescheduled for February 1, 2010.

E. *Declaratory and Injunctive Relief Proceedings*

On February 1, the supposed date of the trustee's sale, plaintiff filed this action for declaratory relief and injunctive relief against Executive Trustee Services, MERS, and GMAC Mortgage, LLC (GMACM), the company that was servicing the loan. Plaintiff alleged that defendants were "attempting to conduct a Trustee's Sale of the Plaintiff's residential real property by rescheduling a Trustee's Sale without notice to the Plaintiff and where the Defendants have not only failed to provide any evidence that they have any legal interest in either the Note or the Deed of Trust but have also specifically ignored and refused Plaintiff's multiple prior requests for specific information * * * including but not limited to the history of the chain of title to the Note and Deed of Trust."

Defendants moved for summary judgment on plaintiff's claims, arguing that plaintiff was in default on the note and that GMACM--the "holder of the Note"--and MERS--the "beneficiary of the Deed of Trust"--were entitled, as a matter of law, to foreclose the trust deed. Specifically, defendants explained:

> "It is indisputable that plaintiff was in default of her loan. As such, it cannot be contested that the holder of the Note and the beneficiary of the Deed of Trust were entitled to foreclose the Deed of Trust. Defendants have put forth conclusive evidence that GMACM, as the holder of the original note and servicer of plaintiff's loan, properly initiated the

> foreclosure of the Deed of Trust on behalf of MERS, the beneficiary of the Deed of Trust, as the nominee of the original lender's assignee, Aurora Bank. LSI, the duly appointed successor trustee, properly executed the non-judicial foreclosure."

(Footnote omitted.) Defendants represented in their summary judgment motion that "GMACM's counsel has the original note and will bring the same to the hearing on this motion."

In response, plaintiff argued, among other contentions, that MERS "is *not* the 'beneficiary' of anything despite boilerplate language in Deeds of Trust." (Emphasis and underscoring in original.) The beneficiary under the OTDA, plaintiff explained, is the person who benefits from the trust deed--*i.e.*, "the one that lends the money." (Internal quotation marks and citation omitted.) The identity of the "beneficiary" matters, plaintiff contended, because nonjudicial foreclosure is only available if "any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in the mortgage records in the counties in which the property described in the deed is situated." ORS 86.735(1). "[W]hat that's telling us in that statute," plaintiff's counsel argued, "is that if there are any assignments which are necessary because the original lender is not the one that's seeking to foreclose, that assignment would have to be recorded, as I'm reading this."

As the parties' arguments unfolded at the hearing, much of the dispute hinged on whether subsection (1) of that statute had been satisfied: *i.e.*, whether there had been an unrecorded assignment by the "beneficiary."[8] Defendants argued that,

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[8] The parties agreed that subsections (2), (3), and (4) were not at issue.

because MERS was the original and current named beneficiary, "[w]e say it was not assigned, Your Honor, but that's where * * * the rubber's going to meet the road." Plaintiff, on the other hand, continued to maintain that MERS was not the true "beneficiary" and that the original lender, who was not part of the foreclosure process, never recorded a subsequent assignment of its beneficial interest:

> "The language in that statute that says, 'And any assignments,' is put there for a reason, and I would proffer to the Court that the reason is, if you've got a stranger to the transaction, a third party who is not the original lender, who is trying to foreclose, you have to show that you, the third party, have the right to do so by a valid recorded assignment, and they don't have one."

Ultimately, the trial court was not persuaded that the statutory text or other sources of Oregon law precluded MERS from acting as "beneficiary" of a trust deed under the OTDA. Consequently, there was no genuine issue of fact regarding "any assignments" of the trust deed being recorded; MERS had never assigned its beneficial interest in the trust deed. Seeing "nothing that indicates that there has been a failure to comply with ORS 86.735," the court granted defendants' motion and entered judgment against plaintiff.

II. ANALYSIS

Plaintiff now appeals that judgment, reprising her argument that MERS is not actually the "beneficiary" of the trust deed under the OTDA.[9] Just as she did in the

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[9] In her first assignment of error, plaintiff argues that defendants lack "standing" to foreclose. We reject that argument without discussion. In her third assignment, she contends that the trial court erred in "refusing to follow Oregon Federal and Bankruptcy Court decisions construing the Oregon Trust Deed Act * * *." If that were a proper assignment of error--which it is not, *see* *Marc Nelson Oil Products, Inc. v. Grim Logging*

trial court, plaintiff focuses on decisions throughout the country (including a slew of recent Oregon federal district court decisions) in which courts have looked beyond the recitals in the trust deed to determine the proper "beneficiary" of that security instrument. *See, e.g., James v. ReconTrust Co.*, ___ F Supp 2d ___, 2012 US Dist LEXIS 26072 (D Or Feb 29, 2012). She urges us to conclude, as some of those courts have, that the statutory "beneficiary" of the trust deed is the original lender, not MERS.

Defendants, for their part, submit that plaintiff contractually agreed that MERS would be the beneficiary of the trust deed, and that nothing in the text of the OTDA prevents a nominee or agent from serving as the "beneficiary" in this particular context. Like plaintiff, defendants marshal various federal cases--including Oregon district court decisions--that support their view of the statutory scheme. *E.g., Beyer v. Bank of America*, 800 F Supp 2d 1157 (D Or 2011).[10]

We turn, then, to the primary issue before us: the meaning of the term "beneficiary" in ORS 86.735(1), which we discern from the text, context, and helpful

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Co., 199 Or App 73, 75 n 1, 110 P3d 120, *adh'd to as modified on recons*, 200 Or App 239, 115 P3d 935 (2005) ("Assignments of error * * * are to be directed against rulings by the trial court, not against components of the trial court's reasoning or analysis that underlie that ruling.")--we would reject it based on the elementary principle that federal courts do not bind state courts on matters of state law.

[10] The parties have supplied us with numerous decisions involving MERS, which we have reviewed. We further note, however, that plaintiff, in particular, has supplied this court with various supplemental "authorities," consisting, in many cases, of pleadings from state and federal courts. We fail to see how the allegations of parties in other cases--other jurisdictions, in fact--are legal authority of any kind. We have not relied at all on those supplemental filings.

legislative history of the statute.[11] State v. Gaines, 346 Or 160, 206 P3d 1042 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). For purposes of the OTDA, "beneficiary" is a defined term; ORS 86.705 provides:

> "As used in ORS 86.705 to 86.795, unless the context requires otherwise:
>
> "(1) 'Beneficiary' means *the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given*, or the person's successor in interest, and who shall not be the trustee unless the beneficiary is qualified to be a trustee under ORS 86.790(1)(d)."

(Emphasis added.)

As noted above, the trust deed in this case stated, "MERS is the beneficiary under this Security Instrument." According to defendants, that is the end of the debate. MERS, under the plain language of the trust deed, is the person named and designated in the trust deed as the beneficiary, and nothing in the OTDA expressly prohibits the parties from contractually agreeing to designate MERS in that way. In other words, absent some express prohibition on this type of arrangement, the person "for whose benefit a trust

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[11] Defendants contend that the sole issue on appeal is the meaning of ORS 86.705(1), the definition of beneficiary, and that the "contention that [defendants] did not comply with ORS 86.735(1) is *not* at issue here." (Emphasis by defendants.) We appreciate that plaintiff's brief is not a model of clarity regarding how the statutory scheme fits together, and her focus certainly is on the definition of "beneficiary" under ORS 86.705(1). However, as the quoted portions of the summary judgment hearing demonstrate, 251 Or App at ___ (slip op at 14-15), the parties and the trial court understood the definition of "beneficiary" in ORS 86.705(1) to be important insofar as it drives the conclusion that there are no unrecorded assignments by the beneficiary for purposes of ORS 86.735(1). The trial court expressly ruled that the requirements of ORS 86.735 for nonjudicial foreclosure were satisfied, and it is that summary judgment that plaintiff has appealed.

deed is given" is whoever the trust deed says it is.[12]

We are not persuaded that the legislature intended circularity and redundancy in defining beneficiary. The legislature could have simply defined "beneficiary" as the person named or otherwise designated in a trust deed *as the beneficiary*. Instead, the legislature used the phrase "the person for whose benefit a trust deed is given[.]" We presume that the legislature used that different language for a reason. State v. Cloutier, 351 Or 68, 98, 261 P3d 1234 (2011) (although redundancy may sometimes be what the legislature intended, such an interpretation "should give us pause"; courts generally strive to "give effect to all" of the parts of a statute (citing ORS 174.010)). That is, we presume that the legislature intended the phrase "person for whose benefit a trust deed is given" to add some content to the definition of beneficiary.

Considering the statutory and historical context of the OTDA, we are persuaded, further, that the legislature understood the "person for whose benefit a trust deed is given" to refer to a particular person--namely, the person to whom the underlying,

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[12] Defendants also suggest that, because plaintiff agreed that MERS would act as the "beneficiary" of the trust deed, she "must prove there is a clear and 'overpowering' Oregon rule of law that the Deed of Trust violates before this Court may interfere with the parties freedom of contract." However, this case is not about the parties' freedom of contract or their intent; it is about *legislative* intent. That is, the OTDA authorizes nonjudicial foreclosure only when certain *statutory* requirements are met, regardless of what the parties might have believed when they executed the trust deed. Thus, the fact that plaintiff "contractually agreed that MERS was the beneficiary in its capacity as agent (nominee) for the lender, its successors and assigns" does not determine whether MERS is the beneficiary *for purposes of the OTDA*.

We further note that defendants do not argue, at least at the summary judgment stage, that plaintiff is somehow estopped from insisting upon compliance with the OTDA, and we expressly do not address that issue.

secured obligation is owed. As previously discussed, the OTDA was enacted with the express understanding that trust deeds would function as a species of mortgage. ORS 86.715 ("A trust deed is deemed a mortgage * * *."). The "benefit" of the trust deed, like a mortgage, is security for an underlying obligation. Indeed, that understanding of the "benefit" of the trust deed--security of an obligation owed to the beneficiary--permeates the statutory scheme. It is present in the definition of "trust deed": "a deed executed in conformity with ORS 86.705 to 86.795, and conveying an interest in real property to a trustee in trust *to secure the performance of an obligation owed by the grantor or other person named in the deed to a beneficiary*," ORS 86.705(5) (emphasis and underscoring added); in the definition of "grantor": "the person conveying an interest in real property by a trust deed *as security for the performance of an obligation*," ORS 86.705(2) (emphasis added); in the statute authorizing trust deeds: "Transfers in trust of an interest in real property may be made *to secure the performance of an obligation of a grantor, or any other person named in the deed, to a beneficiary*," ORS 86.710 (emphasis and underscoring added); and in the statute deeming trust deeds to be mortgages: "the beneficiary is deemed the mortgagee," ORS 86.715.

Nothing in the text, context, or legislative history of the OTDA suggests that the legislature intended the "person for whose benefit a trust deed is given" to refer to anyone other than the party to whom the secured obligation was originally owed. ORS 86.705(1). And, as a matter of historical context, defendants' construction of the statute is not consistent with how security instruments in the nature of mortgages functioned. By the time the OTDA was enacted in 1959, it was well established that the mortgage was

merely an incident to the underlying debt. *See Beauchamp v. Jordan*, 176 Or 320, 327, 157 P2d 504 (1945) ("They were merely an incident to the debts evidenced by the above-mentioned notes and *the transfer of the notes effected a transfer of these mortgages*." (Citations omitted; emphasis added.)); *Rutherford v. Eyre & Co.*, 174 Or 162, 172, 148 P2d 530 (1944) ("[S]ome point is sought to be made by the plaintiffs of the fact that the collateral agreements were not formally assigned to Eyre and Co. But this, of course, was not essential; the mortgages were but incidents to the notes, and endorsement and delivery of the notes carried the mortgages with them * * * and necessarily, also, the collateral agreements, as an integral part of those instruments."); *Schleef v. Purdy et al.*, 107 Or 71, 78, 214 P 137 (1923) ("Until foreclosure and sale the mortgage is a mere chose in action secured by a lien upon the land, which gives to the mortgagor no title or estate whatever to the mortgaged premises. The mortgagor has no interest in the mortgaged premises which he can sell or which can be sold separately from the debt itself, and the transfer of the mortgage, without a transfer of the debt intended to be secured thereby, is a mere nullity. * * * A mortgage given as security for the payment of a note may be transferred *either by the indorsement of the note and the surrender of its possession or, if the note is payable to bearer, by the mere delivery thereof and the surrender of its possession, and this transfer of the note, without any formal transfer of the mortgage, transfers the mortgage*[.]" (Emphasis added.)). In other words, the underlying debt and the security for that debt were not separately transferrable; the party who benefitted from the mortgage and the party to whom the obligation was owed were one and the same.

Defendants, although acknowledging that mortgages were historically considered an "incident to the debt," argue that the legislature nonetheless would have intended to allow nominees or agents to hold "legal title" on behalf of the party to whom the underlying obligation is owed--in other words, to allow someone other than the beneficial owner of the trust deed to serve as the beneficiary. For textual support, defendants point to the language that precedes the definitions in ORS 86.705 and states those definitions apply "[a]s used in ORS 86.705 to 86.795, *unless the context requires otherwise*[.]" (Emphasis added.) That emphasized language, defendants argue, opens the door to a "modified definition" of beneficiary because the "Oregon Legislature expressly contemplated that agents may be used in real estate transactions." As additional context, defendants point to ORS 86.720(3), which states that, before issuance and recording of a release of the trust deed, "the title insurance company or insurance producer shall give notice of the intention to record a release of trust deed *to the beneficiary of record and, if different, the party to whom the full satisfaction payment was made*." (Emphasis added.) According to defendants, that statute is an "expressed recognition that the beneficiary and the note owner are not always the same party. So contrary to [plaintiff's] reading of ORS 86.705(1), the Oregon Legislature has not restricted parties from appointing an agent to serve as beneficiary of record."

Defendants have conflated two issues: (1) who is the "beneficiary" under ORS 86.705(1); and (2) who can act *on behalf of* that beneficiary. The former is the statutory construction question before us, and, in our view, neither agency nor nominee law provides relevant context as to that question, let alone context that demands a

modified statutory definition. Moreover, defendant's suggestion that a nominee or agent might hold "legal title" as the "beneficiary" of a trust deed finds no support in the OTDA or Oregon case law. It is true that "Oregon has recognized since 1862 that one person may hold legal title to property and that another person may hold equitable title to that property." Klamath Irrigation District. v. United States, 348 Or 15, 43, 227 P3d 1145 (2010). But, if anything, that body of law suggests that the holder of legal title under OTDA would be the *trustee*, not a separate "nominee" or "agent" acting on behalf of the beneficiary.[13] *E.g.*, *Newman v. Randall*, 90 Or App 629, 633, 753 P2d 435, *rev den*, 306 Or 155 (1988) ("A person holding legal title to land who sells it by land sale contract thereby vests the equitable title in the vendee. The vendor retains the legal title as security and *as a trustee* for the vendee." (Citations omitted; emphasis added.)).[14]

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[13] Even that proposition is dubious, considering that trust deeds operate like mortgages rather than conveying legal or equitable title. In Kerr v. Miller, 159 Or App 613, 621, 977 P2d 438, *rev den*, 329 Or 287 (1999), we explained:

> "*A trust deed securing the sale of property is deemed a mortgage.* ORS 86.715. With respect to mortgages, Oregon is a 'lien theory' state, *meaning that a mortgage on real estate does not convey legal or equitable title or interest to the holder of the mortgage (mortgagee).* Instead, the mortgagee has only a lien on the property. ORS 86.010; *Land Associates v. Becker*, 294 Or 308, 312, 656 P2d 927 (1982). As a result, if the debtor (the mortgagor) defaults on the obligations secured by the mortgage (*e.g.*, payments on the debt or insuring and maintaining the property), the mortgagee does not gain an immediate right of possession but must instead first foreclose the secured interest. *See* ORS 86.010. Until foreclosure, the mortgagee lawfully may take possession only if the mortgagor voluntarily relinquishes possession."

(Emphasis added.)

[14] Defendants also argue that "[t]he *Restatement (Third) of Property (Mortgages)*

Defendants' reliance on ORS 86.720(3) is also misplaced. That statute, which involves the release of a trust deed, recognizes that the "beneficiary *of record*" might be different from the party to whom the full satisfaction payment is made. ORS 86.720(3) (emphasis added). The language defendants omit makes all the difference. By distinguishing between the "beneficiary" and the "beneficiary of record," the OTDA recognizes that the beneficiary of a trust deed might not be reflected in the public records, because the note has been transferred by indorsement without a recorded assignment. *Cf.* ORS 86.110 (concerning discharge of mortgage "[w]henever a promissory note secured by mortgage on real property is transferred by indorsement without a formal assignment of the mortgage"); *Barringer*, 47 Or at 229 (describing statutes expressly recognizing the "manner of assignment" of a mortgage by indorsement of the underlying promissory note). So, not only does the statutory distinction between "the beneficiary of record" and "party to whom the full satisfaction payment was made" fail to support defendants' contention that the trust deed and underlying obligation can be severed and held by separate parties; it actually cuts against defendants' position, suggesting instead that the beneficial interest passes *with the note* but might not be reflected in the county mortgage

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confirms that an agent may be used to enforce a deed of trust on behalf of a note owner, even instructing courts to 'be vigorous in seeking to find such [an agency] relationship, since the result is otherwise likely to be a windfall for the mortgagor and the frustration of [the note owner's] expectation of security." (quoting *Restatement (Third) of Property (Mortgages)* § 5.4, comment e (1997)). This case is not about whether, as a policy matter, an agent should be allowed to enforce a deed of trust. It is about whether the statutory requirements for nonjudicial foreclosure have been satisfied. The policy concerns discussed in that *Restatement*, which was published long after the OTDA was enacted, do not inform our analysis of the pertinent statutory language. And, in any event, those policy concerns are matters for the Oregon legislature, not the courts.

records.

In sum, we are persuaded that the "benefit" of the trust deed is security for the underlying obligation, and that "the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given" refers to the person named or designated in the trust deed as the party to whom the underlying, secured obligation is owed. We turn, then, to the trust deed at issue.

As described above, the trust deed states that GreenPoint Mortgage Funding, Inc. is the "lender." It further states that "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the beneficiary under this Security Instrument." In a later section, the trust deed explains that the beneficiary of the trust deed is "MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS."

Despite referring to MERS as the beneficiary, the trust deed designates GreenPoint as the party to whom plaintiff, the borrower, owes the obligation secured by the trust deed. The trust deed explicitly "secures to Lender: (i) the repayment of the Loan * * * and (ii) the performance of Borrower's covenants and agreements * * *." For the reasons discussed above, GreenPoint, the lender, is therefore the "beneficiary" of the trust deed within the meaning of ORS 86.705(1), whereas MERS is designated as an agent or nominee of GreenPoint.

Consequently, we conclude that the trial court erred in granting summary judgment in favor of defendants in this case. The trial court, with MERS in mind as the "beneficiary," examined the requirements of ORS 86.735, including the requirement in

subsection (1) that "any assignments of the trust deed by the trustee or the beneficiary * * * are recorded in the mortgage records * * *." There was no genuine issue of material fact regarding the requirement in ORS 86.735(1), the court concluded, because MERS had never assigned the trust deed. The same cannot be said with respect to GreenPoint as beneficiary.

There is evidence in the summary judgment record that GreenPoint transferred its interest in the promissory note, the obligation secured by the trust deed. Transfer of the promissory note was one of the ways that a mortgage was "assigned" when the OTDA was enacted; the other was by a separate written document. 251 Or App at ___ (slip op at 7-8, 20-21); *Barringer*, 47 Or at 229-30. We have no reason to believe that the legislature intended Oregon law regarding the "assignment" of trust deeds to be any different from mortgages. Trust deeds are "deemed to be a mortgage" unless inconsistent with the OTDA, and nothing in the OTDA prescribes any other method of assignment. Thus, like a mortgage, a trust deed may be assigned (1) by a separate writing or (2) by the assignment of the underlying promissory note.

The OTDA, as previously discussed, requires that "*any* assignments" be "recorded in the mortgage records" before a trustee may proceed with nonjudicial foreclosure. ORS 86.735(1) (emphasis added). According to defendants, though, "assignment" refers only to formal, written assignments rather than assignment by transfer of the note. In support of that reading of the statute, defendants argue, first, that a written assignment "is capable of recording" but "a transfer of a note is not." Second, defendants argue that, if "assignment" were to include the transfer of an interest by

operation of law, it would create a conflict with ORS 86.110.

Neither argument is persuasive. First, the text of the OTDA, which refers broadly to "*any* assignment," does not suggest any distinction between those assignments that are readily recordable and those that are not. But, in any event--and contrary to defendants' assertion--an assignment by "transfer of a note" is, in fact, capable of being recorded. Nothing prevents parties from recording a copy of the indorsed note or a separate writing memorializing that transfer.

Second, ORS 86.110(1), as it read when the OTDA was enacted and as it still reads today, refers to the discharge of a mortgage that has been transferred by indorsement "without a *formal* assignment" of the mortgage. ORS 86.110(1) (emphasis added). That statutory language is consistent with the understanding, well established at the time the OTDA was enacted, that there were two methods of assignment, one "formal" and the other by indorsement. As noted above, the text of the OTDA--"*any* assignments"--is broad enough to encompass both. Moreover, we do not perceive a conflict between, on the one hand, a requirement that "any assignment" be recorded before proceeding with nonjudicial foreclosure, and, on the other hand, a statutory procedure that governs proof of satisfaction where a mortgage is transferred without a "formal assignment." The statutes address different subjects and use different language.

In this summary judgment record, there is evidence that GreenPoint assigned its interest in the promissory note and no longer has any beneficial interest in the trust deed; however, there is no evidence that the county mortgage records actually reflect an assignment by GreenPoint. Thus, the trial court erred in granting defendants'

summary judgment motion, because there are genuine issues of material fact as to whether one of the requirements for nonjudicial foreclosure, ORS 86.735(1), has been satisfied.[15]

In sum, we conclude that the "beneficiary" of a trust deed for purposes of the OTDA is the person named or otherwise designated in the trust deed as the person to whom the secured obligation is owed--in this case, the original lender. We further conclude that, because there is evidence that the beneficiary assigned its interest in the trust deed without recording that assignment, there is a genuine issue of material fact on this summary judgment record as to whether ORS 86.735(1), a predicate to nonjudicial foreclosure, has been satisfied. We emphasize, however, that our holding concerns only the requirements for *nonjudicial* foreclosure. *Cf.* ORS 86.710 (beneficiary of the trust deed retains the option of judicial foreclosure). And the import of our holding is this: A beneficiary that uses MERS to avoid publicly recording assignments of a trust deed cannot avail itself of a nonjudicial foreclosure process that requires that very thing--publicly recorded assignments.

Reversed and remanded.

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[15] Defendants argue that plaintiff "never raised the issue of any unrecorded assignments before the trial court" and "[i]n fact, she conceded there were none." Although plaintiff's arguments vacillated, she did raise the issue of unrecorded assignments to the trial court, contending that a third party attempting to foreclose must have "a valid recorded assignment, and [defendants] don't have one."

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual,

Plaintiff,

vs.

HOMECOMINGS FINANCIAL, LLC., a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; EXECUTIVE TRUSTEE SERVICES, LLC., a Delaware Corporation; DOES I-V, ABC CORPORATIONS I-V,

Defendants.

Case No.: CV-OC 1023898

DECISION AND ORDER RE: MOTION TO RECONSIDER

The plaintiff's motion to reconsider came before the Court on October 3, 2012. The Court applied the correct standard for motions for summary judgment and will not reiterate them here. The plaintiff defaulted on his obligations on his mortgage loan which was secured by a trust deed. The trustee resorted to Idaho's non-judicial foreclosure process. In this action, the plaintiff seeks damages from MERS for commencing the foreclosure process under several legal theories discussed more fully in the Summary Judgment Decision previously entered. MERS was the named beneficiary of the Deed of Trust at the time that the plaintiff signed the agreement. Even if the Court were to take judicial notice of all material submitted throughout this entire case and gave the plaintiff the benefit of all favorable inferences on all of the evidence submitted as it did in the Summary Judgment Decision, the plaintiff has failed to come forward with any cognizable claim under Idaho law which would warrant damages against MERS.

The Court applied the correct standard in its summary judgment decision. Securitization does not establish that the loan was paid nor under any legal theory recognized in this jurisdiction does it gives rise to a cause of action against MERS.

Counsel has submitted additional authority: *Bain v. Metropolitan Mortgage Group Inc.*, 2012 WL 351736 (2012), a decision of the Washington Supreme Court decided August 16, 2012 and *Niday v. GMAC Mortgage, LLC*, 251 Or. App. 278, ___P.3d__ (Ct. App. 2012). The *Bain* case is based upon a very different trust deed statute and, therefore, does not compel the same result. In Washington, a trustee is required to have proof that the beneficiary is the owner of the promissory note before non-judicial foreclosure can commence. Because MERS never held the promissory note, it was not a "beneficiary" under Washington law and did not have the power to institute a nonjudicial foreclosure action. In Idaho, a "[b]eneficiary' means the person named or otherwise designated in a trust deed as the person for whose benefit a trust deed is given, or his successor in interest, and who shall not be the trustee." I.C. § 45-1502. MERS was the beneficiary named in the plaintiff's deed of trust.

The plaintiff also submitted *Niday v. GMAC Mortgage, LLC*, 251 Or. App. 278, ___P.3d__ (Ct. App. 2012), an Oregon appeals court decision decided July 18, 2012. *Niday* contains a very good description of the MERS structure and purpose as well as a history of the Oregon recording system. Like Idaho, Oregon in the late 1950's created a streamlined non-judicial foreclosure system for home loans by authorizing the use of trust deeds as long as certain statutory requirements were met both in the creation, recording and default procedure of the trust deed. Also like Idaho, Oregon law requires that any assignment of the trust deed by the trustee or the beneficiary is to be recorded in the county where the real property which is the security for the loan is located. ORS 86.735(1). MERS was created in the 1990's, in part, to dodge state and local recording requirements including fees and to allow private transfers of beneficial interests in promissory notes secured by trust deeds by creating an organization, Mortgage Electronic

Registration Systems Inc., made up of lenders, loan servicers, investors and others who become members of MERS and who track their beneficial interests in the promissory notes and deeds through the MERS private database. MERS was created as *Niday* discusses to make it easier to bundle and sell promissory notes and trust deeds that secure the obligations on the secondary market.

The instant case involves an action claiming damages against MERS under a variety of theories. *Niday* involved a defaulting homeowner who brought an action for injunctive and declaratory relief in a challenge of MERS authority to bring a nonjudicial foreclosure action. In *Niday*, the Oregon Court of Appeals concluded that the "beneficiary" of a trust deed under Oregon law is the person to whom the secured obligation is owed, the original lender, and if that lender-beneficiary assigned its interest in the trust deed to another beneficiary without recording the assignment, then the necessary predicate to nonjudicial foreclosure is not satisfied by the successor beneficiary. In short, that a beneficiary under the MERS structure who is using it to avoid publicly recording assignments of a trust deed cannot use the statutory nonjudicial foreclosure structure since the necessary predicate—publicly recording the assignment of the lender's beneficial interest in the note-- is absent.

Idaho law also requires publicly recorded assignments:

I.C. § 45-1505. Foreclosure of trust deed, when.

The trustee may foreclose a trust deed by advertisement and sale under this act if:
(1) The trust deed, any assignments of the trust deed by the trustee or the beneficiary and any appointment of a successor trustee are recorded in mortgage records in the counties in which the property described in the deed is situated; and

(2) There is a default by the grantor or other person owing an obligation the performance of which is secured by the trust deed or by their successors in interest with respect to any provision in the deed which authorizes sale in the event of default of such provision; ...

The MERS structure, under the *Niday* analysis, skirts Idaho law which requires the public recording of the assignment of the trust deed. The MERS structure, however, harms the counties

who then do not have accurate records of the holders of interests in trust deeds, an issue of serious historical concern since it relates to the integrity of the land records of a state which requires recording, and also deprives the counties of the income from the recording of the assignment of interests in trust deeds and impairs the accuracy of county records. The integrity of property ownership records is a long-standing concern of Anglo-American law. Of course, *Trotter v. Bank of New York*, 152 Idaho 842, 275 P.3d 857 (2012), on an admittedly poor record, rejected an action by the defaulting homeowner for injunctive and declaratory relief in the same circumstances as the *Niday* plaintiff. However, the holding appears to be quite limited since the homeowner in *Trotter* appeared to argue that "standing" had to be proven somehow prior to initiating a non-judicial foreclosure. It does not appear that the issue of failure to record the assignment of the beneficial interest as required by the Idaho Trust Deed statute, I.C. § 45-1505(1), was even raised. The *Trotter* plaintiff was acting *pro se*. *Trotter* does not actually address the issues that the Washington Supreme Court or the Oregon Court of Appeals discussed. Even so, the causes of action raised against MERS in this case seek affirmative relief under other theories. It is not the naming of MERS as beneficiary which caused any harm to the plaintiff. That MERS was the named beneficiary was clear from the time the plaintiff entered into the refinancing transaction. The harm of the MERS structure is to the State and the County's interest in the integrity of its land records and the loss of the fees which would be assessed by this County to record the change of beneficiary. The MERS structure does harm state and county interests and was intended to evade recording obligations and fees but it is not a cause of harm to the homeowner which would give rise to the causes of action asserted in this litigation. It may well be that the Idaho Attorney General or a county prosecutor may wish to challenge the structure but it does not, in my view, give rise to the causes of action raised in this case.

The motion to reconsider is denied. The Motion to Compel is denied. For the purposes of the motion to reconsider the Court will take judicial notice as requested by the plaintiff on all matters and will grant the First, Second and Third Request for Judicial Notice. The defendant's motions to strike, except as specified in the Summary Judgment Decision are denied. Because of the disposition of the Motion to Reconsider and the Court's Summary Judgment Decision, all other plaintiff's motions are denied as moot. The motion to change caption was never noticed for hearing, but, in light of the bankruptcy of Homecomings and Executive Trustee Services, it would be appropriate not to name them in the final judgment.

It is so ordered.

Dated this 16th day of October, 2012.

Deborah A. Bail
District Judge

THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual, Plaintiff, vs. MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; DOES I-V, ABC CORPORATIONS I-V, Defendants.	Case No.: CV-OC 1023898 JUDGMENT WITH I.R.C.P. 54(b) CERTIFICATE

For the reasons stated in the Court's Decision and Order re: Summary Judgment filed July 23, 2012, judgment is entered in favor of Mortgage Electronic Registration Systems, Inc. and all claims against it are dismissed with prejudice.

It is so ordered.

Dated this 16th day of October, 2012.

Deborah A. Bail
District Judge

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 16th day of October, 2012 .

Deborah A. Bail
District Judge

JOHN L. RUNFT (ISB # 1059)
JON M. STEELE (ISB # 1911)
RUNFT & STEELE LAW OFFICES, PLLC
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Attorneys for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual,	)	
	)	
Plaintiff/Appellant,	)	CASE NO. CV OC 1023898
	)	
vs.	)	**NOTICE OF APPEAL**
	)	
HOMECOMINGS FINANCIAL, LLC, a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware Limited Liability Company; DOES I-V, and ABC CORPORATIONS I-V,	)	
	)	
Defendants/Respondent.	)	
	)	

TO: The above named Defendant, Mortgage Electronic Registration Systems, Inc., its attorneys of record, and the Clerk of the above entitled Court:

ORIGINAL

003396

NOTICE IS HEREBY GIVEN THAT:

1. The Plaintiff/Appellant Gregory Renshaw, hereby appeals to the Idaho Supreme Court from the Decision and Order re: Summary Judgment of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, the Honorable Deborah Bail, District Judge presiding, entered herein on July 23, 2012, in the matter entitled *Gregory Renshaw v. Homecomings Financial, LLC, et al*, case No. CV OC 1023898.
2. The Plaintiff/Appellant Gregory Renshaw filed his Motion for Reconsideration of the Decision and Order re: Summary Judgment on August 8, 2012.
3. The District Court entered its Order re Motion for Reconsideration on October 16, 2012.
4. The District Court entered its Judgment on October 16, 2012.
5. Appellant's preliminary statement of issues is as follows:
    (a) Is Mortgage Electronic Registration Systems, Inc. a lawful "beneficiary" within the terms of Idaho's Trust Deed Act at Idaho Code § 45-1502(1), if it never held the promissory note secured by the deed of trust?
    (b) What is the legal effect of Mortgage Electronic Registration Systems, Inc. acting as an unlawful beneficiary under the terms of Idaho's Deed of Trust Act?
    (c) Does Plaintiff/Appellant possess a cause of action under Idaho's Consumer Protection Act against Mortgage Electronic Registration

Systems, Inc. if it acts as an unlawful beneficiary under the terms of Idaho's Deed of Trust Act?

(d) Does the transfer of a promissory note from the lender to a successor result in an automatic assignment of the securing trust deed that must be recorded prior to the commencement of nonjudicial foreclosure proceedings under Idaho Code § 45-1505(1)?

(e) May a statutorily qualified trustee of a deed of trust appoint or delegate its duties to a nonqualified successor?

(f) Is Mortgage Electronic Registration Systems, Inc. entitled to the entry of Summary Judgment in its favor?

(g) Is Plaintiff/Appellant entitled to an award of attorney fees and costs as the result of this appeal?

6. The Appellant has the right to appeal to the Supreme Court, as the Decision and Order re: Summary Judgment described in paragraph 1 above is appealable pursuant to Rule 11(a)(1) I.A.R.

7. A reporter's transcript of the following hearings is requested:

   a. Transcript of hearing on both parties' Motions for Summary Judgment held May 22, 2012;

   b. Transcript of hearing on all Motions held June 13, 2012; and,

   c. Transcript of hearing on Motion for Reconsideration held October 3, 2012.

8. Appellant's copy of the Reporter's transcript should be produced in hard copy format.

9. The Appellant requests the clerk's record be prepared pursuant to Rule 28 I.A.R. and that in addition to the standard record, there be included the following:

(a) First Amended Complaint and Demand for Jury Trial filed February 15, 2011;

(b) Homecomings, MERS, and Executive Trustee Services' Answer to First Amended Complaint and Demand for Jury Trial filed on March 10, 2011;

(c) Motion for Judgment on the Pleadings filed June 15, 2011;

(d) Memorandum in Support of Motion for Judgment on the Pleadings filed Judge 15, 2011;

(e) Brief in Opposition to Defendants' Motion for Judgment on the Pleadings filed June 23, 2011;

(f) Affidavit of Steele in Support of Brief in Opposition to Defendants' Motion for Judgment on the Pleadings filed June 23, 2011;

(g) Supplemental Brief filed July 6, 2011;

(h) Supplemental Brief in Opposition to Defendants' Motion for Judgment on the Pleadings filed July 7, 2011;

(i) Memorandum Decision and Order on Defendant's Motion to Dismiss entered August 3, 2011;

(j) Order Granting Joint Stipulation to Dismiss all Claims Against Colonial First Lending filed December 13, 2011;

(k) Expert Witness Disclosure filed March 12, 2012;

(l) Request for Judicial Notice filed March 16, 2012;

(m) Memorandum in Support of Request for Judicial Notice filed March 16, 2012;

(n) Defendants' Motion for Summary Judgment filed March 21, 2012;

(o) Memorandum in Support of Defendants' Motion for Summary Judgment filed March 21, 2012;

(p) Affidavit of Matthew McGee in Support of Defendants' Motion for Summary Judgment filed March 21, 2012;

(q) Affidavit of Kyle Lucas in Support of Defendants' Motion for Summary Judgment filed March 21, 2012;

(r) Motion for Partial Summary Judgment filed April 11, 2012;

(s) Memorandum in Support of Motion for Partial Summary Judgment filed April 11, 2012;

(t) Affidavit of Steele in Support of Motion for Partial Summary Judgment filed April 11, 2012;

(u) Motion to Compel filed April 20, 2012;

(v) Memorandum in Support of Motion to Compel filed April 20, 2012;

(w) Second Request for Judicial Notice filed April 20, 2012;

(x) Plaintiff's Response to Defendant's Motion for Summary Judgment filed May 8, 2012;

(y) Response in Opposition to Plaintiff's Motion for Partial Summary Judgment filed May 8, 2012;

(z) Motion to Strike Expert Disclosure of Kahn filed May 8, 2012;

(aa) Memorandum in Support of Motion to Strike Expert Disclosure of Kahn filed May 8, 2012;

(bb) Rebuttal Expert Witness Disclosure filed May 10, 2012;

(cc) Reply to Defendant's Response in Opposition to Plaintiff's Partial Summary Judgment filed May 15, 2012;

(dd) Plaintiff's Response in Opposition to Defendants' Motion to Strike Report of Kahn filed May 15, 2012;

(ee) Reply in Support of Defendants' Motion for Summary Judgment filed May 15, 2012; Notice of Bankruptcy and Effect of Automatic Stay filed May 16, 2012;

(ff) Notice of Bankruptcy Filing filed May 16, 2012; Memorandum Re: Automatic Stay in re: Non-Bankrupt Defendant Mortgage Electronic Registration Systems Inc. filed May 18, 2012;

(gg) Motion to Stay Case filed May 21, 2012;

(hh) Memorandum in Support of Motion to Stay Case filed May 21, 2012;

(ii) Affidavit of Counsel in Support of Motion to Stay Case filed May 21, 2012;

(jj) Plaintiffs response to Defendants Motion to Stay Case filed May 25, 2012;

(kk) Third Request for Judicial Notice filed May 25, 2012;

(ll) Notice of Plaintiffs intent to Offer Defendants Admissions at Trial filed May 25, 2012;

(mm) Motion in Limine filed May 25, 2012;

(nn) Motion to Permit Plaintiffs Expert Richard Merrill Kahn to Testify Remotely by Video Conference filed May 25, 2012;

(oo) Motion to Determine Sufficiency of Defendants Objection to Plaintiffs Request to Admit filed May 25, 2012;

(pp) Affidavit of Jon Steele in Support of Plaintiffs Opposition to Defendants Motion to Stay filed May 25, 2012;

(qq) Affidavit of Jon Steele in Support of Plaintiffs Motion to Determine Sufficiency of Defendants Objections to Plaintiffs Requests to Admit filed May 25, 2012;

(rr) Affidavit of Jon Steele in Support of Motion to Permit Plaintiffs Expert Richard Merrill Kahn to Testify remotely by Video Conference filed May 25, 2012;

(ss) Memorandum in Support of Third Request for Judicial Notice filed May 25, 2012;

(tt) Memorandum in Support of Motion to Permit Plaintiffs Expert Richard Merrill Kahn to Testify Remotely by Video Conference filed May 25, 2012;

(uu) Motion to Strike Expert Report and Exclude Testimony of Richard Eppink filed May 30, 2012;

(vv) Memorandum in Support of Motion to Strike Expert Report and Exclude Testimony of Richard Eppink filed May 30, 2012;

(ww) Defendant's Motion to Withdraw or Amend Admissions filed May 30, 2012;

(xx) Memorandum in Support of Defendant's Motion to Withdraw or Amend Admissions filed May 30, 2012;

(yy) Affidavit of Matthew McGee in Support of Defendant's Motion to Withdraw or Amend Admissions filed May 30, 2012;

(zz) Motion to Amend Scheduling Order and Continue Trial filed June 6, 2012;

(aaa) Affidavit of Matthew McGee in Support of Defendant's Motion to Amend Scheduling Order filed June 6, 2012;

(bbb) Affidavit of Michael Halligan filed June 6, 2012;

(ccc) Response to Motion to Determine Sufficiency of Defendant's Objections to Plaintiff's Requests for Admissions filed June 6, 2012;

(ddd) Objection to Plaintiff's Second Request for Judicial Notice filed June 6, 2012;

(eee) Response to Plaintiff's Third Request for Judicial Notice filed June 6, 2012;

(fff) Plaintiff's Second Motion in Limine filed June 6, 2012;

(ggg) Plaintiff's Response in Opposition to Defendant's Motion to Withdraw or Amend Admissions filed June 6, 2012;

(hhh) Affidavit of Steele in Opposition to Defendant's Motion to Withdraw or Amend Admissions filed June 6, 2012;

(iii) Second Affidavit of Steele in Support of Motion to Permit Expert Kahn to Testify Remotely filed June 6, 2012;

(jjj) Response to Motion to Strike Expert Report of Eppink filed June 6, 2012;

(kkk) Affidavit of Jon Steele in Support of Plaintiff's Response in Opposition to Defendant's Motion to Strike Expert Report of Eppink filed June 6, 2012;

(lll) Response to Motion to Permit Plaintiff's Expert Richard Merrill Kahn to Testify Remotely by Video Conference filed June 7, 2012;

(mmm) Motion for Leave to Withdraw as Attorney of Record filed June 8, 2012;

(nnn) Affidavit of Michael O Roe in Support of Motion filed June 8, 2012;

(ooo) Second Affidavit of Jon M. Steele in Support of Plaintiff's Motion for Protective Order and in Opposition to Defendant's Motion to Amend Scheduling Order filed June 8, 2012;

(ppp) Response to Defendant's Motion to Amend Scheduling Order and Continue Trial filed June 8, 2012;

(qqq) Reply to Defendant's Opposition to Plaintiff's Motion for Protective Order filed June 8, 2012;

(rrr) Reply to Defendant's Objection to Plaintiff's Second Request for Judicial Notice Filed on 04/20/12 filed June 8, 2012;

(sss) Reply to Defendant's Objection to Plaintiff's Third request for Judicial Notice Filed 05/25/12 filed June 8, 2012;

(ttt) Reply to Defendant's Response to Motion to Permit Plaintiff's Expert Richard Merrill Kahn to Testify Remotely by Video Conference filed June 8, 2012;

(uuu) Reply to Defendant's Response to Motion to Determine Sufficiency of Defendants Objections to Plaintiff's Requests to Admit filed June 8, 2012;

(vvv) Second Affidavit of Steele In Support of Plaintiff's Motion to Compel filed June 8, 2012;

(www) Reply to Defendant's Opposition to Plaintiff's Motion to Compel filed June 8, 2012;

(xxx) Reply in Support of Motion to Withdraw or Amend Admissions filed June 11, 2012;

(yyy) Second Affidavit of Matthew J Mcgee in Support of Motion to Withdraw or Amend Admissions filed June 11, 2012;

(zzz) Reply in Support of Motion to Strike Testimony of Michael McMartin filed June 11, 2012;

(aaaa) Reply in Support of Motion to Strike Testimony of Richard Eppink filed June 11, 2012;

(bbbb) Reply in Support of Motion to Strike Testimony of Richard Kahn filed June 11, 2012;

(cccc) Reply in Support of Motion to Stay Case filed June 11, 2012;

(dddd) Plaintiffs Third Motion in Limine filed June 15, 2012;

(eeee) Supplemental Disclosures To Expert Report Of Richard Kahn Which Was Previously Filed With The Court On March 12, 2012 filed June 19, 2012;

(ffff) Second Affidavit of Michael Roe in Support of Motion for Leave to Withdraw as Counsel of Record for Defendants filed June 22, 2012;

(gggg) Emergency Supplement to the Motion for Leave to Withdraw as Counsel of Record for Defendants filed June 22, 2012;

(hhhh) Order Granting Motion for Leave to Withdraw as Counsel for Defendants and Vacating the Jury Trial Setting filed June 22, 2012;

(iiii) Decision and Order Re: Summary Judgment entered July 23, 2012;

(jjjj) Motion for Reconsideration filed August 6, 2012;

(kkkk) Affidavit of Steele in Support of Plaintiff's Motion for Reconsideration filed August 6, 2012;

(llll) Second Affidavit of Steele In Support of Plaintiffs Motion for Reconsideration filed August 20, 2012;

(mmmm) Brief in Support of Motion for Reconsideration filed September 6, 2012;

(nnnn) Third Affidavit of Steele in Support of Plaintiff's Motion for Reconsideration filed September 6, 2012;

(oooo) Response in Opposition to Plaintiffs Motion for Reconsideration filed September 25, 2012;

(pppp) Affidavit of Michael G Halligan In Support of Defendants Response in Opposition to Plaintiffs Motion for Reconsideration filed September 25, 2012;

(qqqq) Reply to Response in Opposition to Plaintiff's Motion for Reconsideration filed October 1, 2012;

(rrrr) Decision Or Order Re: Motion to Reconsider entered October 16, 2012;

(ssss) Judgment with IRCP 54(b) Certificate entered October 16, 2012;

10. I certify:

a. That a copy of this Notice of Appeal has been served on the Court Reporter;

b. That the estimated fee for preparation of the Clerk's record has been paid;

d. That the Appellants filing fee has been paid; and,

e. That service has been made upon all parties required to be served pursuant to Rule 20 I.A.R.

DATED this 27th day of November 2012.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th day of November 2012, a true and correct copy of the foregoing NOTICE OF APPEAL served upon opposing counsel as follows:

Michael G. Halligan
Sussman Shank LLP
1000 SW Broadway, Suite 1400
Portland, OR 97205-3089
Counsel for MERS

X US Mail
___ Personal Delivery
X Facsimile

Peter J. Salmon
William L. Partridge
Pite Duncan, LLP
950 W. Bannock St., Suite 1100
Boise, ID 83702
Counsel for Homecomings and Executive Trustee

X US Mail
___ Personal Delivery
X Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorneys for Defendants

Brad Thies

JOHN L. RUNFT (ISB # 1059)
JON M. STEELE (ISB # 1911)
RUNFT & STEELE LAW OFFICES, PLLC
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E-mail: JSteele@runftsteele.com

Attorneys for Plaintiff/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual, Plaintiff/Appellant, vs. HOMECOMINGS FINANCIAL, LLC, a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware Limited Liability Company; DOES I-V, and ABC CORPORATIONS I-V, Defendants/Respondent.	CASE NO. CV OC 1023898 **AMENDED NOTICE OF APPEAL**

TO: The above named Defendant, Mortgage Electronic Registration Systems, Inc., its attorneys of record, and the Clerk of the above entitled Court:

ORIGINAL

NOTICE IS HEREBY GIVEN THAT:

1. Plaintiff/Appellant Gregory Renshaw, hereby appeals to the Idaho Supreme Court from the Decision and Order re: Summary Judgment of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, the Honorable Deborah Bail, District Judge presiding, entered herein on July 23, 2012, in the matter entitled *Gregory Renshaw v. Homecomings Financial, LLC, et al*, case No. CV OC 1023898.
2. Plaintiff/Appellant Gregory Renshaw filed his Motion for Reconsideration of the Decision and Order re: Summary Judgment on August 8, 2012.
3. The District Court entered its Order re Motion for Reconsideration on October 16, 2012.
4. The District Court entered its Judgment on October 16, 2012.
5. Plaintiff/Appellant's preliminary statement of issues is as follows:
    (a) Is Mortgage Electronic Registration Systems, Inc. a lawful "beneficiary" within the terms of Idaho's Trust Deed Act at Idaho Code § 45-1502(1), if it never held the promissory note secured by the deed of trust?
    (b) What is the legal effect of Mortgage Electronic Registration Systems, Inc. acting as an unlawful beneficiary under the terms of Idaho's Deed of Trust Act?
    (c) Does Plaintiff/Appellant possess a cause of action under Idaho's Consumer Protection Act against Mortgage Electronic Registration

Systems, Inc. if it acts as an unlawful beneficiary under the terms of Idaho's Deed of Trust Act?

(d) Does the transfer of a promissory note from the lender to a successor result in an automatic assignment of the securing trust deed that must be recorded prior to the commencement of nonjudicial foreclosure proceedings under Idaho Code § 45-1505(1)?

(e) May a statutorily qualified trustee of a deed of trust appoint or delegate its duties to a nonqualified successor?

(f) Is Mortgage Electronic Registration Systems, Inc. entitled to the entry of Summary Judgment in its favor?

(g) Is Plaintiff/Appellant entitled to an award of attorney fees and costs as the result of this appeal?

6. Plaintiff/Appellant has the right to appeal to the Supreme Court, as the Decision and Order re: Summary Judgment described in paragraph 1 above is appealable pursuant to Rule 11(a)(1) I.A.R.

7. A reporter's transcript of the following hearings is requested:

   a. Transcript of hearing on both parties' Motions for Summary Judgment held May 22, 2012;

   b. Transcript of hearing on all Motions held June 13, 2012; and,

   c. Transcript of hearing on Motion for Reconsideration held October 3, 2012.

8. Plaintiff/Appellant's copy of the Reporter's transcript should be produced in hard copy format.

9. The clerk's record shall be prepared as a scanned record provided by Rule. 27(c)2 I.A.R.

10. The Plaintiff/Appellant requests the clerk's record be prepared pursuant to Rule 28 I.A.R. and that in addition to the standard record, there be included the following:

    (a) First Amended Complaint and Demand for Jury Trial filed February 15, 2011;

    (b) Homecomings, MERS, and Executive Trustee Services' Answer to First Amended Complaint and Demand for Jury Trial filed on March 10, 2011;

    (c) Memorandum Decision and Order on Defendant's Motion to Dismiss entered August 3, 2011;

    (d) Order Granting Joint Stipulation to Dismiss all Claims Against Colonial First Lending filed December 13, 2011;

    (e) Expert Witness Disclosure filed March 12, 2012;

    (f) Request for Judicial Notice filed March 16, 2012;

    (g) Defendants' Motion for Summary Judgment filed March 21, 2012;

    (h) Memorandum in Support of Defendants' Motion for Summary Judgment filed March 21, 2012;

    (i) Affidavit of Matthew McGee in Support of Defendants' Motion for Summary Judgment filed March 21, 2012;

    (j) Affidavit of Kyle Lucas in Support of Defendants' Motion for Summary Judgment filed March 21, 2012;

    (k) Motion for Partial Summary Judgment filed April 11, 2012;

(l) Memorandum in Support of Motion for Partial Summary Judgment filed April 11, 2012;

(m) Affidavit of Steele in Support of Motion for Partial Summary Judgment filed April 11, 2012;

(n) Second Request for Judicial Notice filed April 20, 2012;

(o) Plaintiff's Response to Defendant's Motion for Summary Judgment filed May 8, 2012;

(p) Response in Opposition to Plaintiff's Motion for Partial Summary Judgment filed May 8, 2012;

(q) Rebuttal Expert Witness Disclosure filed May 10, 2012;

(r) Reply to Defendant's Response in Opposition to Plaintiff's Partial Summary Judgment filed May 15, 2012;

(s) Reply in Support of Defendants' Motion for Summary Judgment filed May 15, 2012;

(t) Notice of Bankruptcy Filing filed May 16, 2012;

(u) Third Request for Judicial Notice filed May 25, 2012;

(v) Notice of Plaintiffs intent to Offer Defendants Admissions at Trial filed May 25, 2012;

(w) Supplemental Disclosures To Expert Report Of Richard Kahn Which Was Previously Filed With The Court On March 12, 2012 filed June 19, 2012;

(x) Order Granting Motion for Leave to Withdraw as Counsel for Defendants and Vacating the Jury Trial Setting filed June 22, 2012;

(y) Decision and Order Re: Summary Judgment entered July 23, 2012;

(z) Motion for Reconsideration filed August 6, 2012;

(aa) Affidavit of Steele in Support of Plaintiff's Motion for Reconsideration filed August 6, 2012;

(bb) Second Affidavit of Steele In Support of Plaintiffs Motion for Reconsideration filed August 20, 2012;

(cc) Brief in Support of Motion for Reconsideration filed September 6, 2012;

(dd) Third Affidavit of Steele in Support of Plaintiff's Motion for Reconsideration filed September 6, 2012;

(ee) Response in Opposition to Plaintiffs Motion for Reconsideration filed September 25, 2012;

(ff) Affidavit of Michael G Halligan In Support of Defendants Response in Opposition to Plaintiffs Motion for Reconsideration filed September 25, 2012;

(gg) Reply to Response in Opposition to Plaintiff's Motion for Reconsideration filed October 1, 2012;

(hh) Decision and Order Re: Motion to Reconsider entered October 16, 2012;

(ii) Judgment with IRCP 54(b) Certificate entered October 16, 2012;

11. I certify:

a. That a copy of this Notice of Appeal has been served on the Court Reporter;

b. That the estimated fee for preparation of the Clerk's record has been paid;

d. That the Appellants filing fee has been paid; and,

e. That service has been made upon all parties required to be served pursuant to Rule 20 I.A.R.

DATED this 28th day of November 2012.

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of November 2012, a true and correct copy of the foregoing AMENDED NOTICE OF APPEAL served upon opposing counsel as follows:

Michael G. Halligan
Sussman Shank LLP
1000 SW Broadway, Suite 1400
Portland, OR 97205-3089
Counsel for MERS

_____ US Mail
_____ Personal Delivery
_X___ Facsimile

Peter J. Salmon
William L. Partridge
Pite Duncan, LLP
950 W. Bannock St., Suite 1100
Boise, ID 83702
Counsel for Homecomings and Executive Trustee

_____ US Mail
_____ Personal Delivery
_X__ Facsimile

Susan Gambee
Ada County Courthouse
200 W. Front St.
Boise, ID 83702

_____ US Mail
_____ Personal Delivery
_X__ Facsimile

RUNFT & STEELE LAW OFFICES, PLLC

By: _____
JON M. STEELE
Attorneys for Defendants

Michael G. Halligan, ISB No. 6874
mikeh@sussmanshank.com
SUSSMAN SHANK LLP
1000 SW Broadway, Suite 1400
Portland, OR 97205-3089
Telephone: (503) 227-1111
Facsimile: (503) 248-0130

Attorneys for Mortgage Electronic Registration Systems, Inc.

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual,

Plaintiff-Appellant,

v.

HOMECOMINGS FINANCIAL, LLC, a Delaware Limited Liability Company; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware Corporation; EXECUTIVE TRUSTEE SERVICES, LLC, a Delaware Limited Liability Company; DOES I-V, and ABC CORPORATIONS I-V,

Defendants-Respondents.

Supreme Court Docket No. 40512-2012
Ada County Docket No. CV OC 1023898

REQUEST FOR ADDITIONAL RECORD

TO: THE ABOVE NAMED APPELLANT AND THE PARTY'S ATTORNEY, AND THE CLERK OF THE ABOVE ENTITLED COURT:

NOTICE IS HEREBY GIVEN, that the Respondent in the above-entitled proceeding hereby requests pursuant to Rule 19(c), I.A.R., the inclusion of the following material in the clerk's record in addition to that required to be included by the I.A.R. and the Amended Notice of Appeal. Any additional transcript is to be provided in [ ] hard copy [x] electronic format [ ] both (check one).:

///

1. Clerk's Record:

a. Motion to Strike Expert Disclosure of Kahn filed May 8, 2012;

b. Memorandum in Support of Motion to Strike Expert Disclosure of Kahn filed May 8, 2012;

c. Plaintiff's Response in Opposition to Defendants' Motion to Strike Report of Kahn filed May 15, 2012;

d. Memorandum in Support of Third Request for Judicial Notice filed May 25, 2012;

e. Defendant's Motion to Withdraw or Amend Admissions filed May 30, 2012;

f. Memorandum in Support of Defendant's Motion to Withdraw or Amend Admissions filed May 30, 2012;

g. Affidavit of Matthew McGee in Support of Defendant's Motion to Withdraw or Amend Admissions filed May 30, 2012;

h. Objection to Plaintiff's Second Request for Judicial Notice filed June 6, 2012;

i. Response to Plaintiff's Third Request for Judicial Notice filed June 6, 2012;

j. Plaintiff's Response in Opposition to Defendant's Motion to Withdraw or Amend Admissions filed June 6, 2012;

k. Affidavit of Steele in Opposition to Defendant's Motion to Withdraw or Amend Admissions filed June 6, 2012;

l. Reply to Defendant's Objection to Plaintiff's Second Request for Judicial Notice filed on April 20, 2012 filed June 8, 2012;

m. Reply to Defendant's Objection to Plaintiff's Third request for Judicial Notice filed May 25, 2012 filed June 8, 2012;

SUSSMAN SHANK LLP, ATTORNEYS AT LAW
1000 SW BROADWAY, SUITE 1400, PORTLAND, OREGON 97205-3089
TELEPHONE (503) 227-1111 | FACSIMILE (503) 248-0130

n. Reply in Support of Motion to Withdraw or Amend Admissions filed June 11, 2012; and

o. Second Affidavit of Matthew J. McGee in Support of Motion to Withdraw or Amend Admissions filed June 11, 2012.

I further certify that this request for additional record has been served upon the clerk of the district court and upon all parties required to be served pursuant to Rule 20, I.A.R., and that the estimated fee for preparation of the clerk's record will be paid upon receipt of the invoice.

DATED this 10th day of December, 2012.

SUSSMAN SHANK LLP

By _____
Michael G. Halligan, ISB No. 6874
Attorneys for Mortgage Electronic Registration Systems, Inc.

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SUSSMAN SHANK LLP, ATTORNEYS AT LAW
1000 SW BROADWAY, SUITE 1400, PORTLAND, OREGON 97205-3089
TELEPHONE (503) 227-1111 | FACSIMILE (503) 248-0130

CERTIFICATE OF SERVICE

I certify that on December 10, 2012 I served, **via First Class Mail**, a full and correct copy of the foregoing **REQUEST FOR ADDITIONAL RECORD**, to the interested parties of record, addressed as follows:

Jon M. Steele
Runft & Steele Law Offices
1020 W. Main Street, Suite 400
Boise, ID 83702
Email: jsteele@runftsteele.com
Attorneys for Plaintiff

Peter J. Salmon
William L. Partridge
Pite Duncan, LLP
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Attorneys for Defendants Homecomings Financial, LLC and Executive Trustee Services, LLC Counsel

Dated: December 10, 2012

Michael G. Halligan, ISB No. 6874

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JAN 23 2013
CHRISTOPHER D. RICH, Clerk
By MARGARET LUNDQUIST
DEPUTY

TO: Clerk of the Court
Idaho Supreme Court
451 West State Street
Boise, Idaho 83720
(208) 334-2616

IN THE SUPREME COURT OF THE STATE OF IDAHO

GREGORY RENSHAW, Plaintiff-Appellant, vs. HOMECOMINGS FINANCIAL, LLC, et al, Defendants-Respondent.	Docket No. 40512

NOTICE OF TRANSCRIPT OF 161 PAGES LODGED

Appealed from the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, Deborah A. Bail, District Court Judge.

This transcript contains hearing held on: 5/22/12, 6/13/12, & 10/3/12

DATE: January 9, 2013

Susan G. Gambee

Susan G. Gambee, Official Court Reporter
Official Court Reporter,
Judge Deborah Bail
Ada County Courthouse
Idaho Certified Shorthand Reporter No. 18
Registered Merit Reporter

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual,

Plaintiff-Appellant,

vs.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation,

Defendant-Respondent,

and

HOMECOMINGS FINANCIAL, LLC., a Delaware limited liability company; EXECUTIVE TRUSTEE SERVICES, LLC., a Delaware limited liability company; DOES I-V, and ABC CORPORATIONS I-V,

Defendants.

Supreme Court Case No. 40512

CERTIFICATE OF EXHIBITS

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 24th day of January, 2013.

CHRISTOPHER D. RICH
Clerk of the District Court

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual,

Plaintiff-Appellant,

vs.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation,

Defendant-Respondent,

and

HOMECOMINGS FINANCIAL, LLC., a Delaware limited liability company; EXECUTIVE TRUSTEE SERVICES, LLC., a Delaware limited liability company; DOES I-V, and ABC CORPORATIONS I-V,

Defendants.

Supreme Court Case No. 40512

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

JON M. STEELE
ATTORNEY FOR APPELLANT
BOISE, IDAHO

MICHAEL G. HALLIGAN
ATTORNEY FOR RESPONDENT
PORTLAND, OREGON

CHRISTOPHER D. RICH
Clerk of the District Court

By _____
Deputy Clerk

Date of Service: JAN 2 4 2013

CERTIFICATE OF SERVICE

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

GREGORY RENSHAW, an individual,

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Defendants.

Supreme Court Case No. 40512

CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsel.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 27th day of November, 2012.

CHRISTOPHER D. RICH
Clerk of the District Court

By _____
Deputy Clerk

DISTRICT COURT 4TH JUDICIAL DISTRICT OF THE STATE OF IDAHO